TAT Water Quality ~~Standards~~ Requirements.

Protection Agency (EPA) regulations. The proposed water quality standards revisions and supporting analyses shall be made available to the public prior to the hearing. The Tribes shall submit the revised standards and any supporting analyses to the EPA Regional Administrator for review and approval within 30 days following the final action to adopt revised standards. The Tribal submission shall be consistent with EPA requirements found at 40 CFR 131.6.

DEFINITIONS

(a) Biological criteria, also known as biocriteria, are narrative expressions or numeric values of the biological characteristics of aquatic communities based upon appropriate reference conditions. Biological criteria serve as an index of aquatic community health.

(b) Constructed wetlands are those wetlands intentionally designed, constructed, and operated on upland, non-wetland sites for the primary purpose of wastewater or stormwater treatment or environmental remediation. Constructed wetlands are not "wetlands of the Tribes."

(c) Criteria are elements of water quality standards, expressed as a desired condition, constituent concentration, level, or narrative statement, representing a quality of water that supports a particular use.

(d) Designated use means a use that is specified in water quality standards as a goal for the waterbody segment, whether or not it is currently being attained.

(e) Existing use means a use that is actually attained in the water body on or after November 28, 1975, whether or not it is included in the water quality standards.

(f) Mixing zones are areas surrounding or downstream of a point source discharge where the effluent plume is progressively diluted by the receiving water and certain numerical water quality criteria otherwise applicable to the waterbody segment may be exceeded.

(g) Near instantaneous and complete mixing of a pollution source to a river or stream means no more than a 10% difference in bank-to-bank concentrations within a longitudinal distance not greater than 2 stream/river widths.

(h) Outstanding National Resource Water (ONRW) means a waterbody segment that has been designated as an ONRW in the tribal water quality standards.

(i) Priority toxic pollutants are those listed by the EPA Administrator under CWA § 307(a).

(j) Primary contact recreation means swimming and other activities that potentially involve total body immersion and/or incidental water exposure, such as rafting, wind surfing, canoeing, tubing, kayaking, scuba diving, snorkeling and water skiing.

(k) Secondary contact recreation means wading and other similar water recreational activities where there is reduced likelihood of total body immersion.
(l) Toxics are those pollutants that have a toxic effect on living organisms. The CWA § 307(a) priority toxic pollutants are a subset of this group of pollutants.

(m) Water quality standards consist of a designated use or uses, numeric and narrative criteria, and an antidegradation policy.

(n) Waters of the Tribes include all those waters that satisfy the federal definition of "waters of the U.S." that is found at 40 CFR 122.2, and generally include all lakes, rivers, streams (including intermittent and ephemeral streams), wetlands, sloughs and ponds located within the exterior boundaries of the Reservation.

(o) Wetlands are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

ANTIDEGRADATION POLICY

(a) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(b) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Tribes finds, after appropriate intergovernmental coordination and public participation, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Tribes shall assure water quality adequate to protect existing uses fully. Further, the Tribes shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources. The Tribes will encourage all cost-effective and reasonable best management practices for nonpoint source water pollution control.

(c) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

(d) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the federal Clean Water Act.

NARRATIVE WATER QUALITY CRITERIA:

(a) All the surface waters on the reservation shall be free from substances attributal to wastewater discharges or other pollutant sources that:

(1) settle to form objectionable deposits,

(2) float as debris, scum, oil, or other matter forming nuisances,

(3) produce objectionable color, odor, taste, or turbidity,

(4) cause injury to, or are toxic to, or produce adverse physiological responses in humans, animals, or plants; or

(5) produce undesirable or nuisance aquatic life.

(b) Implementation. The narrative water quality criteria shall be implemented taking into consideration appropriate EPA technical guidance concerning development of water quality-based controls, such as methods described in the Technical Support Document for Water Quality Based Toxic Control, EPA, 1991. For substances for which numeric water quality criteria have not have not been adopted, these narrative water quality criteria shall be implemented considering appropriated information, including any criteria guidance issued by EPA under CWA § 304(a) and/or information in EPA's toxicity databases. For substances where numeric criteria have not been adopted for the public water supply use, these narrative water quality criteria shall be implemented considering any drinking water standards or health advisories issued by EPA under the Safe Drinking Water Act. Point source discharge implementation whole effluent toxicity (WET) limitations as required in the latest edition of the EPA Region VIII NPDES Whole Effluent Toxics Control Program document.

Narr

(a) All surface waters on the Reservation shall be free from substances attributable to wastewater discharges or other pollutant sources that:

(1) settle to form objectionable deposits,

(2) float as debris, scum, oil, foam or other matter forming nuisances,

(3) produce objectionable color, odor, taste or turbidity,

(4) cause injury to, or are toxic to, or produce adverse physiological responses in humans, animals or plants; or

(5) produce undesirable or nuisance aquatic life.

(b) Implementation. The narrative water quality criteria shall be implemented taking into consideration appropriate EPA technical guidance concerning development of water quality-based controls, such as methods described in the *Technical Support Document for Water Quality Based Toxics Control*, EPA, 1991. For substances for which numeric water quality criteria have not been adopted, these narrative water quality criteria shall be implemented considering appropriate information, including any criteria guidance issued by EPA under CWA § 304(a) and/or information in EPA's toxicity database. For substances where numeric criteria have not been adopted for the public water supply use, these narrative water quality criteria shall be implemented considering any drinking water standards or health advisories issued by EPA under the Safe Drinking Water Act. Implementation of (a)(4) for purposes of NPDES permits shall result in appropriate acute and chronic effluent quality limitations consistent with the federal water quality-based permitting found at 40 CFR 122.44(d), including whole effluent toxicity (WET) limitations as required in the latest edition of the *EPA Region VIII NPDES Whole Effluent Toxics Control Program* document.

NARRATIVE BIOLOGICAL CRITERION:

(a) Criterion: Reservation waters shall be free from substances, whether attributable to human-induced point source discharges or nonpoint source activities, in concentrations or combinations which would impair the aquatic community as it naturally occurs.

(b) Implementation: The intent of the Tribes in adopting a narrative biological criterion is solely to provide an additional assessment tool that can be used to identify impaired surface waters. At this point in time, regulatory or enforcement actions based solely on the narrative biological criterion, such as development and enforcement of NPDES permit limits, are not authorized. However, adequate and representative biological assessment information may be used in combination with other information, for example, to assist in determining whether designated uses are attained and to assist in determining whether new or revised chemical-specific permit limitations may be needed. In addition, the scope of how the Tribes' narrative biological criterion is used may change in the future, as the Tribes become more experienced and confident in the biological assessment program. Implementation will be based on comparison of current biological conditions at a particular site to the conditions deemed attainable based on an appropriate reference site or condition. In all cases appropriate sampling and analysis techniques will be used, consistent with recommended EPA methods and the Tribes' Quality Assurance Project Plan (QAPP).

WATER QUALITY STANDARDS FOR WETLANDS

(a) All wetlands on the Reservation which are not constructed wetlands are considered "waters of the Tribes" and shall be subject to narrative criteria and applicable antidegradation provisions. Wetlands are generally assumed to provide habitat capable of supporting aquatic biota (e.g. fish, macroinvertebrates, amphibians or hydrophytic vegetation) on a regular or periodic basis. It shall be a goal of the Tribes to maintain the water quality of wetlands at naturally occurring levels, within the natural range of variation for the individual wetland. For substances that are not

naturally occurring, water quality requirements shall be based on protecting existing uses of the wetland consistent with antidegradation requirements, the Tribes' narrative water quality criteria, criteria assigned to hydrologically-connected surface waters, or appropriate criteria guidance issued by the U.S. Environmental Protection Agency. Wetlands shall not be considered as repositories or treatment systems for wastes from human or human induced sources.

DESIGNATED USES

(a) A designated use may be specified as a goal for the waterbody segment, whether or not the use is currently being attained. The following designated uses may be assigned to individual Reservation surface water segments consistent with the requirements of 40 CFR 131.10:

I - Public Water Supply. Waters that are suitable or intended to become suitable as potable water supplies.

IIA - Primary Contact Recreation. Waters that are suitable or intended to become suitable for recreational activities in or on the water that potentially involve total body immersion and/or incidental water consumption and exposure, such as rafting, wind surfing, canoeing, tubing, kayaking, scuba diving, snorkeling and water skiing.

IIB - Secondary Contact Recreation. Waters that are suitable or intended to become suitable for recreational activities on or about the water including wading and other similar water recreational activities where there is reduced likelihood of total body immersion.

IIIA - Coldwater Aquatic Life - provides for protection and propagation of aquatic life normally found in waters where the summer temperature does not often exceed 20° C.

IIIB - Warmwater Aquatic Life - provides for protection and propagation of aquatic life normally found in waters where the summer temperature frequently exceeds 20° C.

IV - Industrial Water Supply. Water suitable for industrial processes and cooling water. The industrial use classification includes industrial cooling and process water supplies. This classification protects industrial equipment from damage from cooling and/or process waters. Specific criteria would depend on the industry involved.

V - Agriculture. Waters suitable or intended to become suitable for crops usually grown on the Reservation and which are not hazardous as drinking water for livestock.

VI - Navigation - limited navigation possible on intermittent basis when practicable.

(b) For the indicated water bodies, the designated uses shall be as follows:

Water Body Description	*Designated Uses*
Streams / Creek / Rivers	
Cranes Creek	IIB, IIIB, V
Shell Creek	IIA, IIIB, V
East Fork Shell Creek	IIA, IIIB, V
Deepwater Creek	IIA, IIIB, V
Charging Creek	IIB, IIIB, V
Six Mile Creek	IIA, IIIB, V
Beaver Creek	IIA, IIB, IIIB, V
-From point of origin and/or Reservation line to 200 yards upstream of BIA Road #22	IIB, IIIB, V
-From 200 yards upstream of BIA gravel Road #22 to downstream confluence with Lake Sakakawea	IIA, IIIB, V
Malnourie Creek	
-From origin and/or Reservation line to 200 yards upstream of BIA paved road #22	IIB, IIIB, V
-From 200 yards upstream of BIA paved road #22 to downsteam confluence with Lake Sakakawea	IIA, IIB, IIIB, V
Hans Creek	IIA, IIIB, V
Little Missouri River	IIA, IIIB, V
East Fork Creek	IIA, IIIB, V
Moccasin Creek	IIB, IIIB, V
Squaw Creek	IIB, IIIB, V
Skunk Creek	IIB, IIIB, V
Camp Creek	IIB, IIIB, V
Bear Den Creek	IIA, IIB, IIIB, V
-From point of origin and/or reservation line to 400 yards upstream of State Highway #22	IIB, IIB, IIIB, V
-From 400 yards upstream of State Highway #22 to downsteam confluence with Lake Sakakawea	IIA, IIB, IIIB, V
Little Shell Creek	IIA, IIIB, V
Clarks Creek	
-From point of origin and/or reservation line to 200 yards upstream of State Highway #22	IIB, IIIB, V
-From 200 yards upstream of State Highway #22 to downsteam confluence with Lake Sakakawea	IIA, IIIB, V
North Fork Creek	IIA, IIIB, V
Antelope Creek	IIA, IIIB, V

Lakes / Reservoirs / Sloughs

Lake Sakakawea	I, IIA, IIIA, IIIB, V, VI
Lake Susie Reservoir	IIA, IIIB, V
Brumwall Slough	IIA, IIIB, V
Minehan Slough	IIA, IIIB, V
Blackwater Lake	IIA, IIIB, V

All water bodies not specifically mentioned are classified as , IIA, IIB, IIIA, IV, V, VI.

NUMERIC CRITERIA

(a) The numeric criteria listed in Tables 1 and 2 are applicable to all surface waters which have been assigned the indicated designated use. It is recognized that during certain periods of the year, some waters may contain naturally-occurring quantities of some substances at concentrations which exceed the indicated criteria. At such times, it shall be consistent with these water quality standards to adopt a site-specific criterion on a seasonal or year-round basis that is based on the naturally-occurring concentration, provided that the naturally-occurring concentration can be accurately and reliably determined, and it is clear that the elevated concentration is not partially or entirely the result of human activities. Such criteria shall be appended to the water quality standards for the affected waterbody segment or segments. Where the analytical detection limit of a particular substance is greater than the adopted numeric criterion, that consideration will not affect the applicability of the numeric criterion for regulatory purposes, but may influence enforcement decisions such as the identification of compliance thresholds to be included in the National Pollutant Discharge Elimination System (NPDES) permits. Adoption of numeric criteria does not create surface water monitoring requirements. In general, the Tribal surface water monitoring program will concentrate on measurement of parameters known or suspected to be present or discharged. For carcinogens, the criteria intended to protect human health reflect a 10^{-6} incremental risk factor.

TABLE 1
NUMERIC CRITERIA TO SUPPORT AQUATIC LIFE (IIIA AND IIIB)
AND PUBLIC WATER SUPPLY USES
(Except where indicated, all concentrations are ug/l)

Parameter	CAS No.	---Aquatic Life IIIA and IIIB Uses--- Acute	Chronic	Fish Cons.	Public Water Supply Use

Priority Toxic Pollutants					
Acenaphthene	83-32-9	-	-	990	670
Acrolein	107-02-8	-	-	290	190
Acrylonitrile (c)	107-13-1	-	-	0.25	0.051
Benzene (c)	71-43-2	-	-	51	2.2
Benzidine (c)	92-87-5	-	-	0.000020	0.000086
Carbon tetrachloride (c)	56-23-5	-	-	1.6	0.23
Chlorobenzene	108-90-7	-	-	1600	130
1,2,4-Trichlorobenzene	120-82-1	-	-	70	35
Hexachlorobenzene (c)	118-74-1	-	-	0.00029	0.00028
1,2-Dichloroethane (c)	107-06-2	-	-	37	0.38
1,1,1-Trichloroethane	71-55-6	-	-	-	200 m
Hexachloroethane (c)	67-72-1	-	-	3.3	1.4
1,1-Dichloroethane	75-34-3	-	-	-	-
1,1,2-Trichloroethane (c)	79-00-5	-	-	16	0.59
1,1,2,2-Tetrachloroethane (c)	79-34-5	-	-	4	0.17
Chloroethane	75-00-3	-	-	-	-
Bis(2-chloroethyl) ether (c)	111-44-4	-	-	0.53	0.030
2-Chloroethyl vinyl ether (c)	110-75-8	-	-	-	-
2-Chloronaphthalene	91-58-7	-	-	1,600	1,000
2,4,6-Trichlorophenol (c)	88-06-2	-	-	2.4	1.4
p-Chloro-m-cresol	59-50-7	-	-	-	3000 #
Chloroform (HM) (c)	67-66-3	-	-	470 u	5.7 u
2-Chlorophenol	95-57-8	-	-	150	81
1,2-Dichlorobenzene	95-50-1	-	-	1,300	420
1,3-Dichlorobenzene	541-73-1	-	-	960	320
1,4-Dichlorobenzene	106-46-7	-	-	190	63
3,3'-Dichlorobenzidine (c)	91-94-1	-	-	0.028	.021
1,1-Dichloroethylene (c)	75-35-4	-	-	7,100	330
1,2-trans-Dichloroethylene	156-60-5	-	-	10,000	140
2,4-Dichlorophenol	120-83-2	-	-	290	77
1,2-Dichloropropane	78-87-5	-	-	15	0.50
1,3-Dichloropropylene	542-75-6	-	-	1700 u	10 u
2,4-Dimethylphenol	105-67-9	-	-	850	380
2,4-Dinitrotoluene (c)	121-14-2	-	-	3.4	0.11
2,6-Dinitrotoluene	606-20-2	-	-	-	-

TABLE 1 (cont.)
NUMERIC CRITERIA TO SUPPORT AQUATIC LIFE (IIIA AND IIIB)
AND PUBLIC WATER SUPPLY USES
(Except where indicated, all concentrations are ug/l)

Parameter	CAS No.	---Aquatic Life IIIA and IIIB Uses--- Acute	Chronic	Fish Cons.	Public Water Supply Use

1,2-Diphenylhydrazine (c)	122-66-7	-	-	0.20	0.036
Ethylbenzene	100-41-4	-	-	2100	530
Fluoranthene	206-44-0	-	-	140	130
4-Chlorophenyl phenyl ether	7005-72-3	-	-	-	-
4-Bromophenyl phenyl ether	101-55-3	-	-	-	-
Bis(2-chloroisopropyl) ether	39638-32-9	-	-	65,000	1400
Bis(2-chloroethoxy) methane	111-91-1	-	-	-	-
Methylene chloride (HM) (c)	75-09-2	-	-	590	4.6
Methyl chloride (HM)	74-87-3	-	-	-	-
Methyl bromide (HM)	74-83-9	-	-	1500	47
Bromoform (HM) (c)	75-25-2	-	-	360 u	4.3 u
Dichlorobromomethane(HM) (c)	75-27-4	-	-	17 u	0.55 u
Chlorodibromomethane (HM) (c)	124-48-1	-	-	34 u	0.41 u
Hexachlorobutadiene (c)	87-68-3	-	-	18	0.44
Hexachlorocyclopentadiene	77-47-4	-	-	1,100	40
Isophorone (c)	78-59-1	-	-	960	35
Naphthalene	91-20-3	-	-	-	-
Nitrobenzene	98-95-3	-	-	690	17
2-Nitrophenol	88-75-5	-	-	-	-
4-Nitrophenol	100-02-7	-	-	-	-
2,4-Dinitrophenol	51-28-5	-	-	5,300	69
B4,6-Dinitro-o-cresol	534-52-1	-	-	765	13
N-Nitrosodimethylamine (c)	62-75-9	-	-	3.0	.00069
N-Nitrosodiphenylamine (c)	86-30-6	-	-	6.0	3.3
N-Nitrosodi-n-propylamine (c)	621-64-7	-	-	.51	.0050
Pentachlorophenol (c)	87-86-5	20*	13*	3.0	0.27
Phenol	108-95-2	-	-	1,700,000	21,000
Bis(2-ethylhexyl)phthalate (c)	117-81-7	-	-	2.2	1.2
Butyl benzyl phthalate	85-68-7	-	-	1,900	1,500
Di-n-butyl phthlate	84-74-2	-	-	4,500	2,000
Di-n-octyl phthlate	117-84-0	-	-	-	-
Diethyl phthalate	84-66-2	-	-	44,000	17,000
Dimethyl phthlate	131-11-3	-	-	1,100,000	270,000
Benzo(a)anthracene (PAH) (c)	56-55-3	-	-	0.018	0.0038
Benzo(a)pyrene (PAH) (c)	50-32-8	-	-	0.018	0.0038

TABLE 1 (cont.)
NUMERIC CRITERIA TO SUPPORT AQUATIC LIFE (IIIA AND IIIB)
AND PUBLIC WATER SUPPLY USES
(Except where indicated, all concentrations are ug/l)

Parameter	CAS No.	---Aquatic Life IIIA and IIIB Uses--- Acute	Chronic	Fish Cons.	Public Water Supply Use

Benzo(b)fluoranthene (PAH) (c)	205-99-2	-	-	0.018	0.0038
Benzo(k)fluoranthene (PAH) (c)	207-08-9	-	-	0.018	0.0038
Chrysene (PAH) (c)	218-01-9	-	-	0.018	0.0038
Acenaphthylene (PAH)	208-96-8	-	-	-	-
Anthracene (PAH)	120-12-7	-	-	40,000	8,300
Benzo(g,h,i)perylene (PAH)	191-24-2	-	-	-	-
Fluorene (PAH)	86-73-7	-	-	5,300	1,100
Phenanthrene (PAH)	85-01-8	-	-	-	-
Dibenzo(a,h)anthracene (PAH)(c)	53-70-3	-	-	0.018	0.0038
Indeno(1,2,3-cd)pyrene (PAH)(c)	193-39-5	-	-	0.018	0.0038
Pyrene (PAH)	129-00-0	-	-	4,000	830
Tetrachloroethylene (c)	127-18-4	-	-	3.3	0.69
Toluene	108-88-3	-	-	15,000	1, 300
Trichloroethylene (c)	79-01-6	-	-	30	2.5
Vinyl chloride (c)	75-01-4	-	-	2.4	.025
Aldrin (c)	309-00-2	1.5	-	0.000050	0.000049
Dieldrin (c)	60-57-1	1.25	0.0019	0.000054	0.000052
Chlordane (c)	57-74-9	1.2	0.0043	0.00081	0.00080
4,4'-DDT (c)	50-29-3	0.55	0.001	0.00022	0.00022
4,4'-DDE (c)	72-55-9	-	-	0.00022	0.00022
4,4'-DDD (c)	72-54-8	-	-	0.00031	0.00031
alpha-Endosulfan	115-29-7	0.11	0.056	89	62
beta-Endosulfan	115-29-7	0.11	0.056	89	62
Endosulfan sulfate	1031-07-8	-	-	89	62
Endrin	72-20-8	0.09	0.0023	0.060	0.059
Endrin aldehyde	7421-93-4	-	-	0.30	0.29
Heptachlor (c)	76-44-8	0.26	0.0038	0.000079	0.000079
Heptachlor epoxide (c)	1024-57-3	0.26	0.0038	0.000039	0.000039
alpha-BHC (c)	319-84-6	-	-	0.0049	0.0026
beta-BHC (c)	319-85-7	-	-	0.017	0.0091
gamma-BHC (Lindane) (c)	58-89-9	1.0	0.08	1.8	0.98
delta-BHC	319-86-8	-	-	-	-
PCB 1242 (Arochlor 1242) (c)	1336-36-3	-	0.014	0.000045 u	0.000044 u
PCB-1254 (Arochlor 1254) (c)	1336-36-3	-	0.014	0.000045 u	0.000044 u
PCB-1221 (Arochlor 1221) (c)	1336-36-3	-	0.014	0.000045 u	0.000044 u

TABLE 1 (cont.)
NUMERIC CRITERIA TO SUPPORT AQUATIC LIFE (IIIA AND IIIB)
AND PUBLIC WATER SUPPLY USES
(Except where indicated, all concentrations are ug/l)

Parameter	CAS No.	---Aquatic Life IIIA and IIIB Uses--- Acute	Chronic	Fish Cons.	Public Water Supply Use
PCB-1232 (Arochlor 1232) (c)	1336-36-3	-	0.014	0.000045 u	0.000044 u

PCB-1248 (Arochlor 1248) (c)	1336-36-3	-	0.014	0.000045 u	0.000044 u
PCB-1260 (Arochlor 1260) (c)	1336-36-3	-	0.014	0.000045 u	0.000044 u
PCB-1016 (Arochlor 1016) (c)	1336-36-3	-	0.014	0.000045 u	0.000044 u
Toxaphene (c)	8001-35-2	0.73	0.0002	0.00028	0.00028
Antimony (tr)	7440-36-0	-	-	640	5.6
Arsenic (c, tr, inorganic)	7440-38-2	360	190	0.14 u	0.018 u
Asbestos (c)	1332-21-4	-	-	-	7000000 f/l m
Beryllium (c, tr)	7440-41-7	-	-	-	4 m
Cadmium (tr)	7440-43-9	3.9**	1.1**	84 u	5.0 m
Chromium (III) (tr)	7440-47-3	1700**	210**	-	100 m (total)
Chromium (VI) (tr)	-	16	11	3400 u	100 m (total)
Copper (tr)	7440-50-8	18**	12**	-	1000 #
Cyanide	57-12-5	22	5.2	140	140
Lead (tr)	7439-92-1	82**	3.2**	-	15 m
Mercury (tr)	7439-97-6	2.4	0.012	0.051	0.050
Nickel (tr)	7440-02-0	1400**	160**	4600 u	100 m
Selenium (tr)	7782-49-2	20	5	4200	170
Silver (tr)	7440-22-4	4.1**	-	110000 u	170 u
Thallium (tr)	7440-28-0	-	-	0.47	0.24
Zinc (tr)	7440-66-6	120**	110**	26,000 u	5000 µg/l –taste and odor, or 7400 µg/l health effect
Dioxin (2,3,7,8-TCDD) (c)	1746-01-6	-	-	0.000000014	0.000000013
Other Parameters					
Alachlor (c)	15972-60-8	-	-	-	2 m
Aluminum (pH 6.5-9.0 only)	7429-90-5	750	87	-	-
Ammonia	7664-41-7	***	***	-	-
Atrazine	1912-24-9	-	-	-	3 m
Barium	7440-39-3	-	-	-	2000 m
Bis(chloromethyl) Ether (c)	542-88-1	-	-	0.078	0.00016
Carbofuran	1563-66-2	-	-	-	40 m
Chloride	16887-00-6	860000	230000	-	-
Chlorine (TRC)	7782-50-5	19	11	-	-
Chlorpyrifos	2921-88-2	0.083	0.041	-	-

TABLE 1 (cont.)
NUMERIC CRITERIA TO SUPPORT AQUATIC LIFE (IIIA AND IIIB)
AND PUBLIC WATER SUPPLY USES
(Except where indicated, all concentrations are ug/l)

Parameter	CAS No.	---Aquatic Life IIIA and IIIB Uses--- Acute	Chronic	Fish Cons.	Public Water Supply Use
2,4-D	94-75-7	-	-	-	70 m
Dalapon	75-99-0	-	-	-	200 m

Demeton	8065-48-3	-	0.1 rb	-	-
Di(2-ethylhexyl)adipate	103-23-1	-	-	-	400 m
Dibromochloropropane (DBCP) (c)	96-12-8	-	-	-	0.2 m
Dichlorodifluoromethane (HM)	75-71-8	-	-	570000 u	6900 u
Dichloroethylene (cis-1,2-)	156-59-2	-	-	-	70 m
Dinoseb	88-85-7	-	-	-	7 m
Dissolved oxygen	7782-44-7	****	****	-	-
Diquat	85-00-7	-	-	-	20 m
Endothall	145-73-3	-	-	-	100 m
Ethylene dibromide (EDB) (c)	106-93-4	-	-	-	0.05 m
Fluoride	7782-41-4	-	-	-	4,000 m
Glyphosate	1071-83-6	-	-	-	700 m
Guthion	86-50-0	-	0.01 rb	-	-
Iron	7439-89-6	-	1000 rb	-	300 rb
Malathion	121-75-5	-	0.1 rb	-	-
Manganese	7439-96-5	-	-	-	50 rb
Methoxychlor	72-43-5	-	0.03 rb	-	40 m
Mirex	2385-85-5	-	0.001 rb	-	-
Nitrite (as N)	14797-65-0	-	-	-	1,000 m
Nitrates (as N)	14797-55-8	-	-	-	10,000 m
Nitrate+Nitrate (both as N)	17778-88-0	-	-	-	10,000 m
N-nitrosopyrrolidene (c)	930-55-2	-	-	93	0.017
Oxamyl (Vydate)	23135-22-0	-	-	-	200 m
Parathion	56-38-2	0.065	0.013	-	-
Pentachlorobenzene	608-93-5	-	-	4.1 u	3.5 u
pH		7.0 – 9.0	7.0 – 9.0	7.0 – 9.0	
Picloram	1918-02-1	-	-	-	500 m
Simazine	122-34-9	-	-	-	4 m
Styrene	100-42-5	-	-	-	100 m

TABLE 1 (cont.)
NUMERIC CRITERIA TO SUPPORT AQUATIC LIFE (IIIA AND IIIB)
AND PUBLIC WATER SUPPLY USES
(Except where indicated, all concentrations are ug/l)

Parameter	CAS No.	---Aquatic Life IIIA and IIIB Uses--- Acute	Chronic	Fish Cons.	Public Water Supply Use
Sulfide-Hydrogen Sulfide	7783-06-4	-	2 rb	-	-
1,2,4,5-tetrachlorobenzene	95-94-3	-	-	2.9 u	2.3 u
Temperature	Eighty-five degrees Fahrenheit (29.44 degrees Celsius). The maximum increase shall not be greater than five degrees Fahrenheit (2.78 degrees Celsius) above natural background conditions.				

Trichlorofluoromethane (HM)	75-69-4	-	-	860000 u	10000 u
2,4,5-trichlorophenol	95-95-4	-	-	9800 u	1.0 #
2,4,5-TP	93-72-1	-	-	-	50 m
Xylenes	1330-20-7	-	-	-	10,000 m

A "-" indicates that numeric criteria have not been adopted for the indicated designated use. In some cases priority toxic pollutants are listed even though no numeric criteria are specified; this was intended in order to include in these standards a complete list of the 126 priority toxic pollutants. It is also likely that criteria will be adopted for these substances, as EPA criteria guidance becomes available. Except where otherwise indicated, the public water supply criteria are based on EPA § 304(a) "water+fish" consumption criteria recommendations. For carcinogens, fish consumption and water supply numeric criteria are based on a 10^{-6} incremental risk factor.

EXPLANATORY NOTES

CAS No. — Chemical Abstracts Service Registry Number.

Acute — EPA CWA § 304(a) Criterion Maximum Concentration (CMC). The threshold value at or below which there should be no unacceptable effects to freshwater aquatic organisms and their uses if the one-hour concentration does not exceed that CMC value more than once every three years on the average.

Chronic — EPA CWA § 304(a) Criterion Continuous Concentration (CCC). The threshold value at or below which there should be no unacceptable effects to freshwater aquatic organisms and their uses if the four-day concentration does not exceed that CCC value more than once every three years on the average.

Fish Cons. — EPA § 304(a) human health criteria recommendation based on fish consumption assuming 6.5 grams of fish consumed per day over a 70-year lifetime.

(c) — Carcinogens: chemicals classified by EPA as carcinogens for an oral route of exposure; includes A, B1, B2 and C carcinogens.

— The criteria are based on organoleptic (taste and odor) effects. Organoleptic-based criteria recommended by EPA in the 1980 criteria documents are applied to support the public water supply use where such criteria are more stringent than other surface water or drinking water criteria recommended by EPA.

u — The criterion is an updated EPA value based on EPA's Integrated Risk Information System (IRIS), because the EPA cancer slope factor (q1*) or reference dose (RfD) has changed since the CWA § 304(a) criteria were initially published.

m — The criterion is based on an EPA drinking water standard (Maximum Contaminant Level or MCL) or health advisory.

EXPLANATORY NOTES (cont.)

HM — Halomethanes.

PAH — Polynuclear Aromatic Hydrocarbons.

tr — The acute and chronic aquatic life criteria for metals are expressed as total recoverable.

rb — The criterion was published in the Red Book, *Quality Criteria for Water*, EPA (1976).

* — Aquatic life criteria for pentachlorophenol are expressed as a function of pH. Values displayed in the chart correspond to a pH of 7.8 and are calculated as follows:

$$CMC = \exp[1.005(pH) - 4.830] \qquad CCC = \exp[1.005(pH) - 5.290]$$

** The aquatic life criteria for these metals are expressed as a function of total hardness (mg/l. CaCO3). The values displayed in the chart correspond to a total hardness of 100 mg/l. The hardness relationship. with the term "exp" representing the base e exponential function. is as follows:

CMC = exp{ma[ln(hardness)]+ba} CCC = exp{mc[ln(hardness)]+bc}

	ma	ba	mc	bc
cadmium	1.128	-3.828	0.7852	-3.490
copper	0.9422	-1.464	0.8545	-1.465
chromium (III)	0.8190	3.688	0.8190	1.561
lead	1.273	-1.460	1.273	-4.705
nickel	0.8460	3.3612	0.8460	1.1645
silver	1.72	-6.52	-	-
zinc	0.8473	0.8604	0.8473	0.7614

*** Aquatic life criteria for ammonia (mg/l NH_3) are expressed as a function of pH and temperature, as follows (tables presenting specific criteria at various pH and temperature values are available upon request):

$CMC^1 = 0.52/FT/FPH/2$ where:

FT	$= 10^{0.03(20-TCAP)}$	; $TCAP \leq T \leq 30$
	$= 10^{0.03(20-T)}$	; $0 \leq T < TCAP$
FPH	$= 1$	; $8 \leq pH \leq 9$
	$= (1+10^{7.4-pH})/1.25$	; $6.5 \leq pH < 8$
TCAP	= 20 C	;coldwater aquatic life use (IIIA).
	= 25 C	;warmwater aquatic life use (IIIB).

1 The usual CMC averaging period of one hour may not be appropriate if excursions of concentrations to greater than 1.5 times the average occur during the hour; in such cases, a shorter averaging period may be needed. To convert these values to mg/l N, multiply by 0.822.

$CCC^2 = 0.80/FT/FPH/RATIO$ where FT and FPH are as above and:

RATIO	= 13.5	; $7.7 \leq pH \leq 9$
	$= 20(10^{7.7-pH}/1 + 10^{7.4-pH})$	; $6.5 \leq pH < 7.7$
TCAP	= 15 C	; coldwater aquatic life use (IIIA).
	= 20 C	; warmwater aquatic life use (IIIB).

EXPLANATORY NOTES (cont.)

2 Because these formulas are nonlinear in pH and temperature, the criterion should be the average of separate evaluations of the formulas reflective of the fluctuations of flow, pH, and temperature within the averaging period; it is not appropriate in general to simply apply to formula the average pH, temperature and flow. To convert these values to mg/l N, multiply by 0.822.

**** Aquatic life criteria for dissolved oxygen (mg/l) are as follows:

----Aquatic Life IIIA Use----		----Aquatic Life IIIB Use----	
Early Life Stages[1,2]	Other Life Stages	Early Life Stages[2]	Other Life Stages

30 Day Mean	NA[3]	6.5		NA		5.5
7 Day Mean	9.5 (6.5)NA		6.0		NA	
7 Day Mean Minimum	NA	5.0		NA		4.0
1 Day Minimum[4,5]	8.0 (5.0)4.0		5.0		3.0	

1 These are water column concentrations to achieve the required intergravel dissolved oxygen concentrations shown in parentheses. The 3 mg/l differential is discussed in the EPA criteria document. For species that have early life stages exposed directly to the water column, the figures in parentheses apply.

2 Includes all embryonic and larval stages and all juvenile forms to 30-days following hatching.

3 NA (not applicable).

4 For highly manipulative discharges, further restrictions apply (see p. 37 of EPA's criteria document).

5 All minima should be considered as instantaneous concentrations to be achieved at all times.

TABLE 2
NUMERIC CRITERIA TO SUPPORT RECREATION (IIA AND IIB)
AND AGRICULTURE USES (V)
(Except where indicated, all concentrations are ug/l)

Parameter	Recreation Uses IIA	IIB	------Agriculture Use (V)------- Livestock	Irrigation
Fecal Coliforms (per 100 ml)	200 (2)(3)	200 (2)(3)	-	-
Arsenic	-	-	-	
Beryllium	-	-	-	100 (3)
Boron	-	-	-	750 (3)
Cadmium	-	-	50 (4)	-
Chromium	-	-	1000 (4)	-
Copper	-	-	500 (4)	-
Lead	-	-	100 (4)	-
Nitrate (as N)	-	-	100000 (4)	-
Nitrite (as N)	-	-	10000 (4)	-
Selenium	-	-	50 (4)	-
Zinc	-	-	25000 (4)	-

Notes:

(1) Implementation of these criteria shall include case-by-case decisions regarding averaging period and allowable frequency of exceedence, and shall take into consideration the use to be protected and the available toxicological data for the substance, including whether the effects are acute or chronic.

(2) Where data are sufficient, compliance with criteria shall be based on the geometric mean of at least five samples taken over a 30-day period. Where less than five samples are available, no single sample may be more than 200 per 100 ml. Fecal coliform is an indicator only. It may indicate the presence of pathogenic organisms; however, high fecal coliform counts from non-human sources may not indicate organisms detrimental to human health. Where exceedences occur as a result of human sources, then appropriate regulatory action and restrictions on recreation use should be considered.

(3) Criteria based on recommendations included in *Quality Criteria for Water*, 1976, U.S. EPA; U.S. Government Printing Office: 1977 (0-222-904).

(4) Criteria based on recommendations included in *Water Quality Criteria, 1972*, National Academy of Sciences, March, 1973, EPA-R3-73-033.

MIXING ZONES AND DILUTION POLICY

(a) This policy establishes how mixing and dilution of point source discharges with receiving waters will be addressed in developing chemical-specific and whole effluent toxicity discharge limitations. Depending upon site-specific mixing patterns and environmental concerns, some pollutants/criteria may be allowed a mixing zone or dilution while others may not. In all cases, mixing zones and dilution allowances shall be limited as necessary to protect the integrity of the receiving water ecosystem and designated waterbody uses. This policy shall be implemented consistent with guidance issued by the U.S. Environmental Protection Agency.

(b) Where dilution is available at critical conditions and the discharge does not mix at a near instantaneous and complete rate, an appropriate mixing zone for purpose of achieving compliance with chronic water quality requirements (narrative and numeric) may be designated if:

1. meeting water quality standards at the end-of-pipe is not practicable;
2. allowing a mixing zone will not pose unacceptable risks to designated or existing uses;
3. narrative criteria will be achieved within the mixing zone, provided that the "free from toxicity" narrative criterion shall be implemented by requiring compliance with acute chemical specific and whole effluent toxicity permit limitations at the end-of-pipe, without an allowance for dilutions;
4. the size of the mixing zones for streams and rivers does not exceed one-half the cross-sectional area or a length 10 times the stream width at critical low flow, whichever is more limiting; and
5. the size of mixing zones for lakes does not exceed 5% of lake surface area or 200 feet in radius, whichever is more limiting.

(c) Where the discharge is to a river or stream, dilution is available at critical conditions, and available information is sufficient to reasonably conclude that the discharge exhibits near instantaneous and complete mixing, an appropriate dilution allowance may be provided for purposes of establishing discharge limitations. As a maximum, the following critical low flows may be used:

Stream Flows	
Chronic Aquatic Life	4-day, 3-year flow (biologically based)
Acute Aquatic Life	1-day, 3-year flow (biologically based)
Human Health (carcinogens)	harmonic mean flow
Human Health (non-carcinogens)	4-day, 3-year flow (biologically based) or 1-day, 3-year flow (biologically based)

Effluent Flows	
Chronic Aquatic Life	Mean daily flow
Acute Aquatic Life	Maximum daily flow
Human Health (all)	Mean daily flow

(d) Where dilution flow is not available at critical conditions, the discharge limits will be based on achieving water quality criteria at the end-of-pipe. In addition, discharge limits for all point

source discharges to a wetland will be based on achieving water quality criteria at the end-of-pipe.

WATER QUALITY STANDARDS IMPLEMENTATION

(a) All discharges from point sources, all instream activities, and all activities that generate nonpoint source pollution are to be conducted so as to achieve these water quality standards. The Tribes anticipate that both regulatory and voluntary pollution control programs will be needed to address all current and future water quality problems on the Fort Berthold Reservation.

(b) All federal licenses and permits, such as permits for wastewater discharges issued under the National Pollutant Discharge Elimination System (NPDES), shall be conditioned in such a manner as to authorize only activities that will not cause violations of these water quality standards. For new standards, revised standards that have become more stringent, or new interpretations of existing standards, schedules of compliance may be included in such permits where appropriate. Compliance schedules shall be developed considering guidance issued by EPA.

(c) Until such time as the Tribes receive eligibility to implement Section 402 of the Clean Water Act, NPDES permits will be issued by the EPA to comply with the Tribes' water quality standards. All discharge permit applications will be reviewed by both the Tribes and the EPA. The Tribes have the authority to deny certification for any discharge into Reservation waters as described in paragraph (e) of this section if they determine that the proposed discharge would cause a violation of the Tribes' water quality standards.

The Tribes will conduct compliance inspection of all permitted facilities on the Reservation. Inspection results will be submitted to the EPA for review for compliance. The EPA will also have the responsibility of enforcing NPDES permit violations. However, under the CWA the Tribes may initiate citizen suits pursuant to Section 505 against EPA or the permittee to correct permit violations.

(d) The Tribes reserve the right to identify, in a water quality certification, specific water quality standards implementation methods to be used in developing water quality-based point and nonpoint source control requirements. All controls shall be developed using technically-defensible methods such as those described in the EPA guidance documents. These water quality standards will serve as the basis for any § 303(d) total maximum daily loads (TMDLs) developed for Tribal waters.

(e) All activities that require a federal license or permit on the Reservation are subject to certification by the Three Affiliated Tribes consistent with § 401 of the Clean Water Act. In implementing this authority, and depending upon case-specific facts, the Tribes may decide to certify unconditionally, deny certification, or certify with conditions. Conditional certifications shall specify water quality protective conditions, best management practices, or monitoring requirements that must be implemented by the applicant. Where the Tribes determine that the

conditions specified in a certification are not being implemented, or that an activity for which a certification was previously issued is causing a violation or contributing to a violation of the Tribal water quality standards, the Tribes may suspend or revoke a certification pending corrective actions by the applicant, deny certification upon expiration and reissuance of the permit, or initiate a citizen suit consistent with CWA § 505.

(f) These water quality standards apply to all waters affected by nonpoint sources of pollution. At this time, the Tribes intend to rely on voluntary compliance for activities that result in nonpoint sources of pollution but do not require a federal license or permit. All appropriate combinations of individual best management practices should be applied to avoid violation of water quality standards.

(g) Critical Conditions Policy,

1) For purposes of determining water quality-based control requirements for point source discharges, critical conditions shall be determined consistent with the policy and procedure described below, where a steady-state modeling approach is used. Where seasonal controls are appropriate, critical conditions shall be determined based on seasonal characteristics of the receiving water and pollution sources. Other exceptions may be granted where a technically-sound reason to use an alternative method is developed and approved by the Tribes' Natural Resources Department (e.g., where a dynamic or continuous simulation modeling method is used). Critical conditions shall be representative of conditions upstream from the point where the discharge exists.

i) Stream Flows and Effluent Flows:
See the Tribal mixing zone and dilution policy

ii) Temperature and pH (for effluents and receiving waters):
80th percentile of representative samples

iii) Hardness (for effluents and receiving waters):
20th percentile of representative samples.

iv) Ambient Quality:
Dissolved Oxygen - the 20th percentile of available date,
Fecal Coliform - the geometric mean of available data,
Others - the 80th percentile of available date.

ANALYTICAL METHODS

(a) All methods of analysis used in measuring the water quality of surface waters for purposes of determining compliance with these standards shall be in accordance with procedures prescribed in the current *Code of Federal Regulations, Title 40, part 136.*

EXECUTIVE SUMMARY

The Three Affiliated Tribes (TAT) are committed to the protection and preservation of the precious and limited water resources of the Fort Berthold Indian Reservation. In order to protect the surface waters of the Reservation the Tribal Business Council (TBC) adopted Resolution 00-151-DSB on May 11, 2000 approving and adopting "Water Quality Standards for the Three Affiliated Tribes – Fort Berthold Indian Reservation."

On December 20, 1996 the TAT submitted an application to Region 8 of the United States Environmental Protection Agency (US EPA) for a delegation from US EPA to the Tribes authorizing the Tribes to set water quality standards for the surface waters of the Reservation under the federal Clean Water Act.

The Tribes' application has been pending with US EPA since it was received on December 30, 1996. Tribal representatives from the TAT Environmental Division met with US EPA Region 8 staff on December 14, 2005 to discuss the status of the application. It was agreed at that meeting that the application needed to be updated. In addition, it was determined that the Tribes may want to refine the Tribes' position concerning the scope of the jurisdiction asserted by the Tribes in the Northeast Quadrant of the Reservation, and concerning the waters of Lake Sakakawea.

The Environmental Division needs direction on three key decisions in order to move forward with US EPA on the application for delegation of authority to set water quality standards for the surface waters of the Reservation.

1. Should the Application seek delegation for those waters within the Northwest Quadrant?

2. Should the Application seek delegation for those waters within Lake Sakakawea?

3. Should the Environmental Division revise the existing application or submit a new application seeking a DITCA with US EPA for the waters of the Northeast Quadrant and/or Lake Sakakawea?

Finally, it was recommended that the Tribes give serious consideration to the adoption of a Ground Water Code for the protection of the Tribes' ground water resources.

Native American Rights Fund

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MEMORANDUM

TO: Tex Hall, Chairman
Members of the Tribal Business Council
Mandan, Hidatsa and Arikara Nation of the Fort Berthold Indian Reservation

FROM: Patti Jo Thomas, Environmental Manager
Jared Wirtz, Harlan Deane
Three Affiliated Tribes Environmental Division
Donald R Wharton, Senior Attorney
Native American Rights Fund

DATE: March 9, 2006

RE: Water Quality Management and Delegation of Authority to Set Standards

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The Three Affiliated Tribes of the Ft. Berthold Indian Reservation submitted an application in December 1996 to the United States Environmental Protection Agency (US EPA) for delegation of authority to set Water Quality Standards (WQS) under Section 303 of the federal Clean Water Act (CWA). That application has been pending since it was submitted in December 1996. Recently, US EPA inquired whether the Tribes wanted to pursue the existing application or to initiate a new application for Treatment in the Same Manner as a State (aka TAS) – for the purpose of setting WQS under the CWA. Tribal representatives from the Tribes' Environmental Division (Patti Jo Thomas, Program Manager and Jared Wirtz, along with attorney Don Wharton, NARF) met with US EPA Region 8 on December 14, 2005 to discuss pursuit of application for delegation. Attached is a copy of a memorandum summarizing the discussions from that meeting.

There are three key decisions that the Tribes must make in order to move forward on the application before US EPA for delegation of TAS to set water quality standards for the surface waters of the Fort Berthold Indian Reservation.

1. What jurisdiction will the Tribes assert over the lands of the N.E. Quadrant of the Reservation?

2. What jurisdiction will the Tribes assert over the waters of Lake Sakakawea?

3. Will the Tribes ask US EPA to act on the existing application with supplementation on the jurisdictional issue, or should the Tribes file a new amended application with US EPA?

I. The Jurisdictional Issues

A. Reservation Boundary in the Northeast Quadrant

The question of the effect of the Act of June 1, 1910 (36 Stat. 45) on the boundaries of the Fort Berthold Indian Reservation has been addressed by an Opinion of the Solicitor for the United States Department of the Interior[1], and three cases in the federal Court of Appeals for the Eighth Circuit.[2] In each case the determination was that the Surplus Land Act of 1910 did not diminish the boundaries of the Reservation. Nonetheless, Governor Hoeven of the State of North Dakota in a letter dated December 19, 2000 expressly reserved the right to challenge the holding in the *City of New Town v. United States* as it relates to lands in the Northeast Quadrant.

At present the Tribes' application before US EPA includes the assertion of jurisdiction over these lands. It is reasonable to assume, given the legal history of this issue, that US EPA will uphold the Tribes' claim of jurisdiction to the Northeast Quadrant and the surface waters in this area. That, however, does not end the matter. In addition to any challenge which the State may bring to this determination is the question of whether the Tribes can establish adequate claim to jurisdiction over the surface waters on non-Indian activities or fee lands that may impact water quality under the principles of the so-called "*Montana* test."

US EPA will evaluate a tribal assertion of authority over non-member lands in light of the tribal attorney's certification of tribal jurisdiction, comments received in the 30 day comment period, and information from the consultation with the Department of the Interior. The preamble to EPA's 1991 water quality standards regulation the notes that EPA will apply the *Montana* test and require a showing that potential impacts of regulated activities on the tribe are serious and substantial. EPA's analysis recognizes, however, that "because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations . . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands." 56 Fed. Reg. 64876, at 64878. EPA also notes that water quality management serves the purpose of protecting public health and safety, which is a core governmental function to self-government. *Id.* at 64879. These can include both actual and potential nonmember activities. *Montana v. EPA*, 941 F.Supp 945, 952 (D. Mont. 1996), *aff'd.* 137 F.3d 1135 (9th Cir. 1998), *cert. denied* 525 U.S. 921 (1998). Even so, it is incumbent upon the Tribes to demonstrate in their application that there is some real or potential impact on tribal interests form nonmember activity.

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[1] Opinions of the Solicitor, M-36802, March 13, 1970, "Boundaries of the Fort Berthold Indian Reservation in North Dakota."

[2] *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972); *United States v. Standish*, 3 F.3d 1207 (8th Cir., 1993); and *Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir., 1994)

B. Lake Sakakawea

The Attorney General for North Dakota issued a letter opinion on August 2, 2002 concerning whether Lake Sakakawea was within the boundaries of the Fort Berthold Indian Reservation for the purposes of the Indian Gaming regulatory Act. The letter opinion concluded that the Act of October 29, 1949 (63 Stat. 1026), by which the United States acquired land within the Reservation for the Garrison Dam Project, resulted in a diminishment of the boundaries to the extent of the "takings area". The "takings area" includes the entire Lake. In addition, North Dakota purports to set water quality standards for Lake Sakakawea, as well as the Little Missouri River. It is likely, therefore, that given the letter opinion the State of North Dakota will assert that the waters of Lake Sakakawea are not within the Reservation, and are not subject to tribal jurisdiction. Although US EPA has a policy of not approving state claims to jurisdiction over reservation lands or resources, it is unknown whether EPA noted this exception in approving North Dakota's delegation. If EPA did approve the North Dakota standards for the Lake, it may have been at a time when the Agency was paying less attention to tribal jurisdictional issues. EPA staff is looking into this and will get back to us as soon as they have researched it.

C. Should the Tribes amend and supplement existing application on the jurisdictional issue, or should the Tribes file a new amended application with US EPA; Consideration of a DITCA

The application that is pending before Region 8 EPA is inadequate in the areas of jurisdictional statement from the Tribes' legal counsel, and in minor technical areas. With an amended jurisdictional statement and minor technical changes the existing application is probably adequate. It may, however, be in the Tribes' interest to begin with an entirely new application. Included in this consideration is the possibility of considering asking US EPA Region 8 to enter into a Direct Implementation Tribal Cooperative agreement (DITCA). The purpose of this approach would be to have US EPA adopt federal WQS for the Northeast Quadrant, Lake Sakakawea and possibly for the waters of the entire Reservation. After the federal standards are adopted the DITCA with the Tribes would allow for tribal administration and implementation.

This approach would reduce the potentially for a successful jurisdiction challenge from the State. North Dakota could still appeal EPA's action under a DITCA under the claim that EPA was obligated to delegate authority to the State to set standards for the Northeast Quadrant and Lake Sakakawea, and failure to do so by entering into a DITCA with the Tribes is a violation of federal law. The challenge would, however, still put in issues the boundaries of the Reservation since the State's claim would be that EPA is obliged to delegate to it because the Tribe has no jurisdiction in either the Northeast Quadrant or Lake Sakakawea. But the challenge by the State would be to overcome an EPA administrative determination that is entitled to deference, and would not be a direct conflict between the State and the Tribe over a diminishment issue. This latter point is important to the extent that the US Supreme Court is marginally less inclined to accept review of cases based on administrative appeals; all the more true here if it is a challenge to long standing precedent in the Circuit Court.

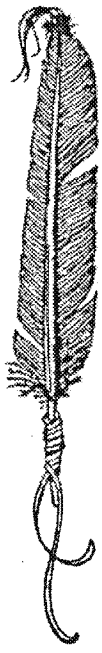
It isn't clear that US EPA Region 8 would enter into a DITCA with the Tribes for the setting of water quality standards. EPA staff advises that they have limited funds and staff available for the setting or direct implementation of such standards. It may also be the case that Region 8 has no delegation of authority to adopt federal standards for the waters in question, and that this would need to be done out of the national Office in D.C. All the same, there is interest in the DITCA process if the details could be worked out.

II. Conclusion

The management of tribal resources is a critical matter for the future of the Mandan, Hidatsa and Arikara Nation. Clearly the quality and integrity of water resources is or paramount importance. In addition, both tribal traditions and federal law require that surface water resources be protected and insulated from degradation. The Tribes can adopt laws and regulations that provide for the protection of the surface waters of the Fort Berthold Indian Reservation and seek to enforce those standards on their own. In addition, federal law requires that minimum standards be set to control sources of pollution to the surface waters. This requirement is the basis for the Tribes to seek either a delegation from US EPA to set and implement the standards to protect the surface waters, or enter into a cooperative agreement with EPA called a DITCA to have EPA adopt federal standards for those waters and have tribal staff manage implementation of the water quality standards through a DITCA work plan.

A key concern for the Tribes is to avoid creating an opportunity for the State of North Dakota to bring a challenge to the Tribes' jurisdiction in the Northeast Quadrant of the reservation, and over the waters of Lake Sakakawea. While there are good cases on the books upholding the boundaries of the Reservation in the Northeast Quadrant, there is always risk in having a US Supreme Court hostile to tribal interests review a case on potential diminishment of reservation boundaries. While pursuing a DITCA with EPA for managing water quality standards is no guarantee that the boundary issue won't get raised, it at least reduces to potential for such a challenge. One downside to this course is that the tribes will not be a party to a judicial challenge to an EPA determination that the State lacks sufficient in the Northeast Quadrant. EPA through the US Department of Justice will be required to litigate the matter in the federal courts. There is the possibility, however, that the Supreme Court would be less interested in hearing a case that is a challenge to an administrative determination, than one that is a direct challenge against a tribe concerning diminishment.

A policy decision from the Tribal Business Council is critical to the ability to move forward. It is essential that decision be made to pursue the delegation from US EPA to set water quality standards or to seek a DITCA and rely on US EPA to defend the Tribes' boundaries if it comes to that. There may be, in the end, little difference in the failure to exercise tribal jurisdiction out of fear for a judicial challenge from the state, and facing that challenge and losing to a biased supreme court. Either way the Tribes are unable to exercise their legitimate authority over lands and resources. Finally, the Tribes must determine whether to supplement the existing application or submit a new revised application.



Native American Rights Fund

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MEMORANDUM

TO: Patti Jo Thomas, Environmental Manager

FROM: Donald R. Wharton

DATE: December 15, 2005

RE: Meeting With US EPA Region 8 Staff on TAS for Water Quality Standards and Ground Water Code

CC: Paul Danks, NRD Administrator
Steve Kelly, Tribal Attorney

We met with the staff of US EPA Region 8 (Attendance List Attached) to discuss the application of the Three Affiliated Tribes' application for delegation of authority to set Water Quality Standards under Sections 303 and 401 the Clean Water Act in the same manner as a state. A copy of the Agenda is attached and a synopsis of the discussion follows:

I. TREATMENT IN THE SAME MANNER AS A STATE (aka TAS) FOR WATER QUALITY STANDARDS PROGRAM

A. Status of the Application

It was agreed that the existing application submitted to US EPA in 1996 was not presently adequate and should not be relied upon without significant supplementation from the Tribes. The two most important areas of supplementation are: 1) The Jurisdictional Statement as relates to the N E Quadrant of the Reservation; and 2) Technical updates for the designated uses for the surface waters of the Reservation.

B. Jurisdictional Statement:

The key questions relating to the Jurisdictional Statement relate to: i) whether the Tribes will claim jurisdiction over the N.E. Quadrant of the Reservation -- where the State of North Dakota has indicated that it may challenge tribal jurisdiction under a claim that the Reservation boundaries were diminished by the Act of June 1, 1910 (36 Stat. 45); ii) whether the Tribes have jurisdiction over the waters of Lake Sakakawea; and, iii) any claim to jurisdiction over non-Indian fee lands or activities that implicate the so-called "Montana test".

i) The Jurisdictional Statement relative to the N.E. Quadrant of the Reservation would need to reiterate the Tribes' position that these lands are within the boundaries and that the 1910 Surplus Land Act did not diminish those boundaries. In a recent opinion of the North Dakota Attorney General concerning potential gaming by the Tribes on Lake Sakakawea, it was acknowledged that the Eighth Circuit Court of Appeals has twice decided that the boundaries were not diminished, and in another case refused to revisit that judicial holding. Based on that, the Attorney General opined that even though the State was not a party to those cases – and therefore not bound by their holdings – that "were the state to relitigate the issue, success is unlikely. A new panel of the Court of Appeals will not overrule *City of New Town* because one panel does not have the power to overrule another panel." 2000 N.D. Op. Atty. Gen. No. L-47. That opinion went on to note that it was unlikely that the state could get review by the full Court of Appeals, that could overrule a panel, and that U.S. Supreme Court review was remote.

Although the Attorney General's Opinion expresses some reluctance to relitigate the boundary issue, a claim of jurisdiction over the lands in the N.E. section of the Reservation for the setting of water quality standards may be enough of an incentive to rethink that position, especially if the state is motivated to bring a challenge to the Tribes' assertion of jurisdiction over the waters of Lake Sakakawea.

ii) The Jurisdictional Statement relative to Lake Sakakawea will likely face a challenge from the state that the 1949 Taking Act for the Garrison Dam Project. Act of October 29, 1949 (63 Stat. 1026) "removed the taking area from the reservation." The Letter Opinion of the Attorney General, State of North Dakota, cited above makes the strong suggestion that the 1949 Taking Act diminished the boundaries of the Reservation, concluding that the Governor of the State has no authority to negotiate a compact for off-reservation gaming, and that Lake Sakakawea was removed from reservation status. This conclusion is hedged only by the conclusion that the definitive answer can only come from a court ruling. It seems fair to conclude that a request by the Tribes for a delegation to set water quality standards on the Lake as part of the Reservation would generate opposition from the State. This would require a determination by US EPA that the Reservation was not diminished by the 1949 Taking Act, or the 1910 Surplus Land. It seems reasonable to expect that if the state brings a challenge to one they have nothing to lose in bringing the challenge to both. Assuming US EPA sustains the Tribes' jurisdiction, the state will almost certainly sue. If US EPA rejects the Tribes' claim of jurisdiction then the Tribes will be faced with the choice whether to sue.

iii) The Jurisdictional Statement as it relates to non-Indian fee lands or activities raises the specific concern about the application of the "Montana test". US EPA has developed detailed process for assessing the application of the Montana test to tribal claims of jurisdiction over non-Indian fee lands. The Tribes will need to develop an extensive and detailed showing of the potential for any impacts to tribal interest from non-Indian impacts on surface waters.

Conclusion: There are specific and important risks in asserting a claim to jurisdiction over the surface waters of the Reservation where that claim will generate opposition from the state raising issues of diminishment of Reservation boundaries. It will be important to present this concern to the Tribal Business Committee and get direction from them concerning how to posture the

assertion of jurisdiction in the application for treatment in the same manner as a state for delegation of setting water quality standards for the surface waters of the Reservation. Assuming the Tribes' jurisdictional claims survive these tests there will still need to be a defense of the Tribes' claims, if any, for jurisdiction over non-Indian fee lands under the *Montana test*.

Note: It was noted that the adoption of tribal water quality standards for the Reservation would assist in the completion of the Draft EIS and Draft NPDES Permit for the proposed refinery. The Tribes may, and it is recommended that they do, adopt such standards for their own purposes wholly apart from seeking a delegation to set standards under the Clean Water Act.

C. Decision Whether to Supplement Existing Application or File a New Application

The question was raised whether to proceed by amendment and supplementation of the existing application or the filing of a completely new application. The pros and cons of these options are not yet fully known. The existing application has been lodged with US EPA since 1996 or 1997. I'm unaware of any advantages – other than the shame factor – to insist on pursuit of the original application since it will require some supplementation in any event.

II. TECHNICAL CONSIDERATIONS

The most important technical consideration was the amendment of the designations of the streams and bringing the application into compliance with recent US EPA requirements. It was determined that the necessary changes had been made and that an application would be sufficient on that ground. There was discussion of several elements that would strengthen the application, all of which the TAT Environmental Division expressed an intention to accomplish. They were not, however, essential to a completed TAS application or completion of the Water Quality Standards.

III. GROUND WATER CODE

The afternoon portion included a meeting with Mike Wireman, Regional Ground Water Expert. Mr. Wireman made presentation on the value of and need for a Tribal Ground Water Code. A copy of his KEY ELEMENTS outline is attached. Mr. Wireman, in particular, felt that adopting a code and standards as soon as possible would be critical to the Tribes' ability to assure protection of their aquifer underlying the proposed refinery project. This was underscored by the fact that, unlike the Clean Water Act for surface waters, there is no existing federal authority to protect groundwater.

IV. OTHER CONSIDERATIONS

While it is reasonable to assume that litigation is the likely response by the State to a determination by US EPA Region 8 to accept tribal assertion of jurisdiction over surface waters in the NE Quarter of the Reservation and of Lake Sakakawea, it is not the necessary outcome. The Tribes have at least two other avenues. First, the Tribes could seek to negotiate a Direct Implementation Tribal Cooperative Agreement (DITCA). It is not clear, however, that a DITCA can accomplish the tribal goal of protection of reservation surface waters, and avoid State challenge to either tribal or federal jurisdiction.

New guidelines for DITCAs were issued November 24, 2004 through the Assistant Administrator, Office of Water. DITCAs provide funding for the award and administration of tribal cooperative agreements, including the development of work plans, for the implementation of federal environmental programs required or authorized by law in the absence of an acceptable tribal program. US EPA must make a determination that the law requires US EPA to implement the program where the tribe is either unable or unwilling to do so. If, in the state context, EPA would be required to directly implement the program, then EPA is authorized to award a DITCA to fund activities for those environmental programs. An example in the "Guidelines for Direct Implementation Tribal Cooperative Agreements" is "Water quality standards promulgation and review and the national Pollutant Discharge Elimination System permit program under the Clean Water Act."

The second possibility is looking to negotiation of an agreement with the State of North Dakota on the setting and implementation of water quality standards. This approach depends upon identifying a priority for the state that can form the basis for discussions.

V. CONCLUSION

There are at least two key decisions that must be made which will form the basis for moving forward on the application to US EPA for delegation of TAS status to set water quality standards for the surface waters of the Reservation. The most important decision is what jurisdiction the Tribes want to assert relative to the N.E. Quadrant and Lake Sakakawea. The second is whether to supplement and amend the existing application or craft a completely new application. In addition, the Tribes will need to determine whether it is a priority to develop a Ground Water Protection Code.

MEMORANDUM

DATE: December 14, 2005
FROM: Mike Wireman, Regional Ground-Water Expert
TO: File – Three Affiliated Tribes – Clean Fuels Refinery
SUBJECT: Key elements of a Tribal Ground-Water Management Program

The key elements listed below focus on ground-water protection and resource management.

KEY ELEMENTS

1. Tribe should formally establish a ***policy of anti degradation*** (or non-degradation – can also be a combination of both).
2. Develop and promulgate rules that establish and describe a ***ground-water classification system.*** It is important to classify the ground waters that occur in the aquifers which underlie the TAT Reservation. The classification applies to ground water in the ground and is focused on assuring beneficial uses. Such systems can be based on ambient conditions for specific water quality parameters (TDS, SC) or based on potential use.
3. Determine the ***water quality standards*** that will apply to classes of ground water and how the standards will be applied.
4. ***Ground-Water Monitoring Program.*** The TAT should develop and implement a long term ground-water monitoring program that is focused on sensitive aquifers and heavily used aquifers. Data on water levels, withdrawal and water quality should be routinely collected and stored in a data base.
5. ***Ground-Water Discharge Permit Program.*** - This program would authorize and set conditions and standards for the discharge of waste waters not covered by UIC or UST programs. It is advisable to require compliance monitoring. Often a perimeter of pollution is authorized - similar to a mixing zone.
6. ***Aquifer Assessment*** - The TAT should map and characterize (water quality, extent, recharge area /discharge areas, etc.) all aquifers that underlie the Reservation and adjacent lands. A lot of this work has been done.
7. ***Source-Water / Wellhead Protection*** - This program should be developed and implemented per the 1996 Amendments to the SDWA.

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STATE OF NORTH DAKOTA
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JOHN HOEVEN
GOVERNOR

December 19, 2000

Mr. William P. Yellowtail
Regional Administrator
US EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

Re: State of North Dakota Comments Regarding
Exterior Boundaries of Fort Berthold Reservation

Dear Mr. Yellowtail:

Thank you for your letter of November 9th in which you ask for the State of North Dakota's comments on the Three Affiliated Tribes' July 11th application for a Clean Air Act, Section 105 grant. Your letter was received November 20th 2000. The application includes a request for EPA determination of the Three Affiliated Tribes' eligibility for "treatment as a state" for purposes of the CAA Section 105 grant. Pursuant to 40 CFR § 49.9, governmental entities can provide written comments regarding any dispute concerning the boundary of the reservation.

North Dakota supports the development of tribal programs including an air quality program on the Fort Berthold Reservation. The North Dakota Department of Health is working with the Three Affiliated Tribes on air quality monitoring and looks forward to working with the Tribes on other air quality matters in the future. The Department is available to provide assistance to the Tribes to develop their air quality program as needed. We also anticipate working with the Tribes on implementation of the EPA Regional Haze Rule. If the Tribes receive "treatment as a state" status, then we should pursue formal agreements to avoid jurisdictional disputes and best serve the people of North Dakota.

The State offers the following comments specific to the Three Affiliated Tribes application. The comments relate to the description of reservation boundaries in the Tribe's application. The application raises three issues.

First, is the application limited to areas within the exterior boundaries of the Fort Berthold Reservation? 40 CFR § 49.7 specifies what information must be included in a tribe's application for a determination that it meets the eligibility requirements for "treatment as a state" under the Clean Air Act. There is a distinction between applications covering areas within the reservation and applications covering areas outside the reservation, 40 CFR § 49.7(a)(3). Because your letter only references the boundary of the reservation and does not address tribal jurisdiction over non-reservation areas, it is our understanding that the Tribe's application is limited to areas within the

exterior boundaries of the Fort Berthold Reservation. However, the application may be construed as asserting jurisdiction over non-reservation areas. So, North Dakota requests a 30-day extension of the comment period pursuant to 40 CFR Section 49.9(c) to have this issue clarified by the Tribes and affording the State an opportunity to comment thereon.

Second, even if the Tribes' application is limited to areas within the exterior boundaries of the reservation, it does not contain a precise legal description of the reservation's boundaries and is therefore legally deficient. The application describes the history of the boundaries, beginning with the 1851 treaty of Fort Laramie and ending with the Act of March 3, 1891, which purport to define the current boundaries. The history of the area was also discussed by the Court in City of New Town v. United States, 454 F.2d 121, 122 (8th Cir. 1972). But, the 1891 Act merely gives a general description of the boundaries. To be complete, the Tribe's application should provide an exact legal description of the boundaries. Since it does not, I ask you to require that it be supplemented, and the State and other interested parties be given an additional thirty days to review and comment on the supplement.

In order to preserve any and all legal remedies that may be available to the State, any discussion of the Fort Berthold Reservation's boundaries requires mention of the "Northeast Quadrant," land in the northeast part of the reservation that was established by the 1891 Act. This area was opened to non-Indian homesteaders in 1910. The Eighth Circuit, in City of New Town rejected the argument that the homesteaded lands were to be removed from the reservation. The State was not a party to that litigation. While we have no present intentions of litigating a reservation boundary issue, nothing we do in response to the Tribe's application should be deemed a waiver of any legal theories that the State has regarding the City of New Town decision.

Third, and finally, the Tribes' application does not address tribal jurisdiction over non-Indian owned fee land within the reservation. It is our position that the Clean Air Act doesn't authorize EPA to extend tribal jurisdiction to non-Indian owned fee land. In particular, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), indicates that the tribe may not have civil jurisdiction on a reservation-wide basis. This concern was raised to you in our correspondence dated June 6, 1989 regarding the Three Affiliated Tribes application under the Clean Water Act. In addition, North Dakota has historically issued and currently has issued several air pollution control permits to facilities within the Reservation boundaries.

Thank you for considering our comments. I look forward to your reply regarding supplementation of the Tribes' application that would commence the State's comment period and my request for a 30-day extension of the comment period.

Sincerely,

John Hoeven
Governor

38:04:33

TOTAL P.03

LETTER OPINION
2002-L-47

August 2, 2002

Mr. Robert W. Harms
Governor's Counsel
Governor's Office
600 East Boulevard Avenue
Bismarck, ND 58505

RE: Gaming on Lake Sakakawea

Dear Mr. Harms:

Thank you for your May 20, 2002, letter in which you ask about a proposal by the Three Affiliated Tribes to conduct gaming on Lake Sakakawea. The Tribe has a casino overlooking the lake but wishes to expand its gaming operation by offering a "casino boat" on the lake. You ask for an opinion on "the Governor's authority to permit Indian gaming on Lake Sakakawea within the exterior boundaries of the reservation." This requires reviewing the Three Affiliated Tribes' existing compact, restrictions placed on the Governor's negotiating authority by N.D.C.C. ch. 54-58, and assessing whether in fact Lake Sakakawea is within the boundaries of the Fort Berthold Indian Reservation.

The Compact

The Tribe's gaming compact contains a provision entitled "Geographic Scope of Compact." It states:

> This compact shall only govern the conduct of Class III games by the Tribe on trust lands within current exterior boundaries of the Fort Berthold Reservation, all in compliance with Section 2719 of the Indian Gaming Regulatory Act. The execution of this Compact shall not in any manner be deemed to have waived the rights of the State pursuant to that section.
>
> The parties agree to discuss at a later date, the possibility of gaming upon waters within the exterior boundaries of the reservation.

Amended Gaming Compact Between the Three Affiliated Tribes and the State of North Dakota, § XXXIII (Oct. 7, 1999) ("1999 Compact"). This provision confines gaming to

"trust lands." Thus, the first issue is whether Lake Sakakawea falls within the term "trust lands."

In Indian law, "trust land" is a term of art with a fairly settled meaning. In general, "trust land" traces its origins to Section 5 of the 1934 Indian Reorganization Act. 25 U.S.C. § 465. The Act allows the Secretary of Interior to acquire land and then hold its title in trust for the benefit of an individual Indian or a tribe. Id. Land acquired or held under 25 U.S.C. § 465 is typically known as "trust land." See e.g., Sac & Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1256 (10th Cir. 2001), cert. denied, 122 S.Ct. 807 (2002); United States v. Roberts, 185 F.3d 1125, 1130, 1132 (10th Cir. 1999); United States v. Stands, 105 F.3d 1565, 1572 (8th Cir. 1997). I am unaware of any action by the federal government to hold Lake Sakakawea or its submerged lands in trust for the Three Affiliated Tribes under Section 465.[1] In 1949 the United States did acquire about 156,000 acres of Indian land for the Garrison Dam Project, a subject discussed below, but its acquisition was in fee and was not an acquisition in trust for the Tribes.

Besides Section 465 acquisitions, "trust" is associated with Indian land in another way. When reservation land was originally broken up into allotments and assigned to individual tribal members, the government retained an interest until a certain amount of time passed, usually 25 years, and then the tribal member received fee title. Prior to acquisition of the fee, these lands are sometimes referred to as "trust allotments." E.g., Francis Paul Prucha II The Great Father: The United States Government and the American Indians 668 (1984). But I am unaware of any submerged land under Lake Sakakawea that would still be an allotment held in trust by the government.

In sum, the lake does not constitute "trust lands." Consequently, Lake Sakakawea is not within Section XXXIII of the 1999 Compact governing the geographic location of gaming. Any doubt that the compact contemplates gaming only on land is resolved by Section XXXIII's second paragraph, which states that the parties will at some future date discuss gaming operations on water. There would have been no need for this provision had the compact and its reference to gaming on "trust lands" contemplated gaming on water.

Limitations on the Governor's Negotiating Authority

Because the current compact does not allow the Tribe to conduct gaming on Lake Sakakawea, such gaming could only occur with a compact amendment. In negotiating an amendment the Governor must comply with the restrictions imposed on his negotiating authority by N.D.C.C. ch. 54-58.

[1] In light of this, I do not need to address a more fundamental question, that is, whether Section 465 even applies to bodies of water.

You bring to my attention a particular provision in this chapter, that is, section 54-58-03(5). This subsection prohibits the Governor from allowing any off-reservation gaming. There is, however, an exception. If an off-reservation gaming location was permitted under a compact in effect on August 1, 1997, then such location is grandfathered. The 1992 compact with the Three Affiliated Tribes was in force on August 1, 1997, but it, too, confined gaming to the reservation. Gaming Compact Between the Three Affiliated Tribes and the State of North Dakota, §§ III, XXX (Sept. 29, 1992).

Because the 1992 Compact did not allow off-reservation gaming, the exception in N.D.C.C. § 54-58-03(5) does not apply. The more fundamental question is whether Lake Sakakawea is within or outside of the Fort Berthold Indian Reservation. If it is within, Governor Hoeven could negotiate a compact amendment allowing gaming on Lake Sakakawea. If the lake is not in the reservation, then the Governor's hands are tied by N.D.C.C. § 54-58-03(5).

Lake Sakakawea and Reservation Boundaries

The 1891 Treaty. Determining whether Lake Sakakawea is within the Fort Berthold Reservation requires review of the treaties, executive orders, and statutes dealing with the reservation's boundaries. While there have been a handful of agreements and executive orders that concern the boundaries of the reservation,[2] its final boundaries were "established by the Act of March 3, 1891, 26 Stat. 1032." City of New Town v. United States, 454 F.2d 121, 122 (8th Cir. 1972). The 1891 Act, in essence, diminished the size of the reservation as established by an 1880 Executive Order so that the reservation boundaries are much the same as they appear on current state road maps.[3]

The 1910 Surplus Lands Act. In 1910 Congress opened the reservation to non-Indian homesteaders. This Act is similar to many other acts that opened reservations to non-Indians around the turn of the century. Tracts of reservation land were first allotted to tribal members and the excess, or surplus land, was then made available to non-Indians. Congressional acts opening the reservations to non-Indians are known as Surplus Lands Acts. It has been asserted that the Three Affiliated Tribes'

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[2] Treaty of Fort Laramie at Art. 5 (Sept. 17, 1851), reprinted in, II Indian Affairs Laws and Treaties 594 (Charles J. Kappler ed. 1904); Exec. Order April 12, 1870, reprinted in, I Indian Affairs Laws and Treaties 883 (Charles J. Kappler ed. 1904); Exec. Order July 13, 1880, reprinted in, id. A description of the federal actions affecting the reservation's boundaries is at Roy W. Meyer, "Fort Berthold and the Garrison Dam," 35 N.D. History 217, 223-25 (1968).

[3] The 1891 Act is based on an 1886 agreement with the Tribe. The agreement and the Act accepting it are reprinted in I Indian Affairs Laws and Treaties 425-28 (Charles J. Kappler ed. 1904).

1910 Surplus Lands Act diminished the reservation, that is, that much of the land north and east of the Missouri River -- the area opened to homesteaders -- was removed from reservation status. Id. But this position has been rejected. Id. at 126-27. See also Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1297-98 (8th Cir. 1994) (reaffirming City of New Town); United States v. Standish, 3 F.3d 1207, 1209 (8th Cir. 1993) (declining to reexamine City of New Town).

Diminishment under the 1910 Surplus Lands Act is relevant to your question about gaming on Lake Sakakawea because gaming likely would occur near the present casino in the vicinity of New Town. This area was part of the area asserted to have been removed from the reservation by the 1910 Act. The state was not a party to past litigation interpreting the 1910 Act and it is not bound by decisions interpreting it. Even so, were the state to litigate the issue, success is unlikely. A new panel of the Court of Appeals will not overrule City of New Town because one panel does not have the power to overrule another panel. E.g., Duncan Energy, 27 F.3d at 1297. Furthermore, obtaining a hearing before the full Court of Appeals, which could overrule City of New Town, is unlikely, and review by the Supreme Court is remote. It is, therefore, my opinion that until the law governing diminishment changes or new facts arise, the state should adhere to the City of New Town ruling in deciding the question you pose.

The 1949 Takings Act for the Garrison Dam Project. Another and more difficult reservation diminishment issue, however, arises as the result of the federal government's acquisition of land for the Garrison Dam Project. In 1949 the United States acquired about 156,000 acres of tribal and allotted Indian land within the reservation and along both sides of the Missouri River. Act of October 29, 1949, 63 Stat. 1026 ("1949 Taking Act"). The land taken, the Taking Area, was the area considered necessary for operation of Garrison Dam.[4]

It is possible that this acquisition removed the Taking Area from the reservation. Indeed, the Corps of Engineers took this position in the 1970s when questions arose about the scope of tribal authority over Lake Sakakawea. John R. Scalzo, Dist. Counsel, U.S. Corps of Engineers, "Legal Memorandum: Jurisdiction over Former Indian Lands of the Fort Berthold Indian Reservation" 14-15, 80-82 (June 1977); Letter from Lt. Col. Lee W. Tucker, U.S. Corps of Engineers, to Thomas Eagle, Sr., Treasurer, Three Affiliated Tribes 2 (Mar. 19, 1976); Memorandum from E. Manning Seltzer, Chief Counsel, U.S. Corps of Engineers, to District Engineer ¶ 2 (Mar. 19, 1976). The Corps reiterated this position in 1985. Letter from John R. Scalzo, Dist. Counsel, U.S. Corps

[4] The story of the Tribes' struggle to stop Garrison Dam and its negotiations for compensation can be found at Roy W. Meyer, "Fort Berthold and the Garrison Dam," 35 N.D. History 217, 239-64 (1968). A summary of this history can be found at Raymond Cross, "Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century," 40 Ariz. L. Rev. 425, 483-90 (1998).

of Engineers, to N.D. Asst. Att'y Gen. Mike Geiermann (Aug. 7, 1985). I do not know if this is still the Corps' position and if it is or ever was shared by other federal agencies. But it does raise the issue and requires consideration of whether the 1949 Taking Act diminished the Fort Berthold Reservation by removing the Taking Area from the reservation.

The law governing reservation diminishment is well-developed because the Supreme Court has considered a number of reservation diminishment and disestablishment cases. Most, if not all of these cases construe Surplus Lands Acts. The 1949 Taking Act is not a Surplus Lands Act. Nonetheless, the Court's analysis would likely apply to the 1949 Act.

The first principle is that Congress has plenary power over Indian affairs. It can, therefore, alter reservation boundaries, even those created by treaty. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998). See also Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903). But to do so congressional intent must be clear. Yankton Sioux Tribe, 522 U.S. at 343. Congressional intent is determined by examining the face of the congressional act in question, events surrounding the act's passage, and, to a lesser degree, subsequent treatment of the land. Id. at 344. The most probative evidence, however, is the statutory language. Id.

"Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to [diminish the reservation]." Solem v. Bartlett, 465 U.S. 463, 470 (1984). In Yankton Sioux, the statutory language indicating an intent to diminish stated that the tribe would "'cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands'" in the reservation. Yankton Sioux Tribe, 522 U.S. at 344. Similar language has been found sufficient to diminish a reservation and disestablish another. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 597 (1977); DeCoteau v. District County Court, 420 U.S. 425, 439 n.22 (1975).

The language in these cases is not unlike that in the Three Affiliated Tribes' 1949 Taking Act. The Act states that "all right, title and interest of said tribes . . . in and to the land constituting the Taking Area . . . shall vest in the United States . . . ." 1949 Taking Act at § 1. See also id. at § 12 (an additional payment "shall be in full satisfaction of . . . all claims, rights, demands and judgments of said tribes . . ."). This language is not exactly the same as that in the case law finding diminishment, but there is "no particular form of words" required for finding diminishment. Hagen v. Utah, 510 U.S. 399, 411 (1994). See also Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977). Indeed, in Hagen the language indicating an intent to diminish stated that "'all the unallotted lands within said reservation shall be *restored to the public domain*.'" Id. at 412. What is necessary is "language evidencing the present and total surrender of all tribal interests . . . ." Solem, 465 U.S. at 470. The 1949 Taking Act's

conveyance of "all right, title and interest" of the Three Affiliated Tribes seems to meet this standard.

If language conveying a tribe's entire interest is coupled with a provision making a sum certain payment, this "would establish a nearly conclusive presumption that the reservation had been diminished." Hagen v. Utah, 510 U.S. at 411. See also Yankton Sioux Tribe, 522 U.S. at 344 (where cession language and a sum certain payment are present an "'almost insurmountable,' presumption of diminishment arises"); DeCoteau, 420 U.S. at 445. Significantly, the 1949 Taking Act contains an unconditional commitment to compensate the Three Affiliated Tribes for the land taken. It makes a $5,105,625 payment for land taken and an additional $7,500,000 allocation to address matters inadequately covered by the $5,105,625 payment. 1949 Takings Act §§ 2, 12.[5]

Thus, the 1949 Taking Act contains the two elements that the Supreme Court has said create a "nearly conclusive" presumption of diminishment, that is, language conveying the tribe's entire interest in the land and a sum certain payment for these interests. But the 1949 Fort Berthold Taking Act was not the only act by which the United States acquired land for its dam projects on the Missouri River. Although the 1944 Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887 (1944) (codified as amended at 16 U.S.C. § 460d (1976)), authorized dams on the Missouri River, the Act did not authorize the taking of Indian property. This was done through other legislation.

Besides the 1949 Fort Berthold Taking Act there were six other takings acts involving Indian tribes. Cheyenne River Oahe Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954); Standing Rock Oahe Act, Pub. L. No. 85-915, 72 Stat. 1762 (1958); Fort Randall (Crow Creek) Act, Pub. L. No. 85-916, 72 Stat. 1766 (1958); Fort Randall (Lower Brule) Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958); Big Bend (Lower Brule) Act, Pub. L. No. 87-734, 76 Stat. 698 (1962); and the Big Bend (Crow Creek) Act, Pub. L. No. 87-735, 76 Stat. 704 (1962). Some of these takings acts have been interpreted to determine if they express an intent to diminish. But none has been found to do so.

The first case was United States v. Wounded Knee, 596 F.2d 790, 796 (8th Cir. 1979). The court found that the Big Bend (Crow Creek) Act did not diminish the Crow Creek Reservation. In Lower Brule Tribe v. South Dakota, 711 F.2d 809, 820-21 (8th Cir.

[5] The Act was contingent on consent by a majority of adult tribal members. 1949 Takings Act § 1. Consent was obtained. Roy W. Meyer, "Fort Berthold and the Garrison Dam," 35 N.D. History 217, 264 (1968). The tribes obtained additional compensation in the Equitable Compensation Act of 1992, Pub. L. No. 102-575, 106 Stat. 4731 (1992), but land transfer portions of the 1992 Equitable Compensation Act were repealed in 1994. Pub. L. No. 103-211, 108 Stat. 3, 41 (1994). The land transfer issue is in litigation. Three Affiliated Tribes v. West, No. 1:94-CV-01086 (D. D.C.).

1983), the court concluded that neither the Fort Randall (Lower Brule) Act nor the Big Bend (Lower Brule) Act diminished the Lower Brule Reservation.[6]

A full analysis of these decisions is unnecessary, but I will make a few points about their value as precedent, which is questionable. First of all, language in the Taking Acts considered in Wounded Knee and Lower Brule is not the same as the language in the Fort Berthold 1949 Taking Act. For example, the Fort Randall (Lower Brule) Taking Act does not appear to have cession language. It states that payment is made to settle "all claims, rights, and demands of said tribe ... arising out of construction of the Fort Randall Dam and Reservoir project ...." 72 Stat. 1773, § 1 (1958). This is the language quoted by the Eighth Circuit, Lower Brule, 711 F.2d at 819, but it is unlike the Fort Berthold Taking Act which does have cession language. The Three Affiliated Tribes conveyed "all right, title and interest" in the Taking Area. 1949 Taking Act at § 1. Another difference between the Taking Acts is that the Fort Berthold Act does not reserve any mineral interests or grazing rights, while the other Taking Acts do reserve to the tribes these interests. E.g., Fort Randall (Lower Brule) Act, Pub. L. No. 85-923, 72 Stat. 1773, §§ 3, 5 (1958); Big Bend (Crow Creek) Act, Pub. L. No. 87-735, 76 Stat. 704, §§ 7, 10 (1962).[7]

In addition, the legislative history of the Missouri River Taking Acts is not the same. For example, the Eighth Circuit relied, in part, on legislative history stating that a "principal purpose" of the Big Bend (Lower Brule) Taking Act was "to provide for the improvement of the social and economic conditions of the members of the Lower Brule Sioux Tribe." Lower Brule, 712 F.2d at 817. The legislative history of the Fort Berthold Taking Act contains just the opposite kind of comments. Within it are numerous statements that inundating Indian land will cause the Three Affiliated Tribes extensive hardships. E.g., H.R. Rep. No. 81-544 at 3, 7 (1949); "Letter from the Secretary of the Interior Transmitting a Report on H.J. Res. 33 ..." 16-17 (Ctte. on Pub. Lands Doc. No. 1, 1949) (significant disruptions will be caused to all aspects of tribal life); War Dep't Civil Functions Appropriation 1947: Hearing on H.R. 5406 Before the Subcomm. of the Sen. Comm. on Appropriations 339 (Mar. 6, 1946) (Statement of Sen. O'Mahoney) (project "will, in actual fact ruin their reservation").

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[6] In an unpublished decision a District Court found that the Cheyenne River Oahe Act did not diminish the Cheyenne River Reservation. South Dakota v. Ducheneaux, 1990 WL 605077 **11-14 (D .S.D. Aug. 21, 1990), rev'd on other grounds sub nom. South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991), rev'd, 508 U.S. 679 (1993). Though the District Court's diminishment decision wasn't appealed, the Court of Appeals, in dicta, viewed the reservation as undiminished. South Dakota v. Bourland, 949 F.2d 984, 990 (8th Cir. 1991).

[7] The Three Affiliated Tribes had its mineral rights restored in 1984 and grazing privileges granted in 1962. Pub. L. No. 98-602, 98 Stat. 3152 (1984); Pub. L. No. 87-695, 76 Stat. 594 (1962).

The jurisdictional history of the lands taken by the Acts is dissimilar. For example, in Wounded Knee the court noted that the Crow Creek Tribe "has provided the sole regulation of Indians and non-Indians within the taking area." Wounded Knee, 596 F.2d at 795. The Three Affiliated Tribes, however, does not assert jurisdiction over non-Indians on the lake. On the contrary, State Game and Fish Department wardens regularly patrol Lake Sakakawea and enforce state fishing and boating laws. Furthermore, the Department, under agreements with the Corps of Engineers, has developed and manages a number of wildlife management areas and "lake access" facilities within the Taking Area.

The Wounded Knee and Lower Brule decisions are further suspect because the Supreme Court has further developed the law of diminishment. It was not until 1984 that the Supreme Court stated that "an almost insurmountable presumption" of diminishment arises with a conveyance of all tribal interests along with the payment of a sum certain. Solem v. Bartlett, 465 U.S. 463 (1984). The Eighth Circuit did not have the benefit of this clear statement of the law when it decided Wounded Knee and Lower Brule Tribe in 1979 and 1983. Though it is now clear that the presence of a sum certain payment is integral to any diminishment argument, Wounded Knee did not even mention that the Big Bend Taking Act makes a sum certain payment to the Crow Creek Tribe.

Finally, South Dakota v. Bourland, 508 U.S. 679 (1993), casts doubt on some of the reasoning in Lower Brule. In Lower Brule the Eighth Circuit remarked that the continued "Indian control" of the Taken Area would not be inconsistent with the purposes for which the dam and reservoir were constructed. Lower Brule, 711 F.2d at 817-18, 820. It also, in an apparent attempt to distinguish the Fort Randall (Lower Brule) Taking Act from Surplus Lands Acts, noted that the land was taken for a flood control project and not for settlement by non-Indians. Id. at 820. But Bourland states that the 1944 Flood Control Act and the Taking Act there did indeed affect tribal control. Citing the "open-access mandate" of the 1944 Flood Control Act and provisions of the Taking Act, the Court found, unlike the Eighth Circuit, tribal interests in the Taken Area significantly affected. Bourland, 508 U.S. at 691-92. "[W]hen Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." Id. at 692.

In sum, I am unwilling to conclude that the Wounded Knee and Lower Brule decisions foreclose a finding that the 1949 Taking Act diminished the Fort Berthold Reservation.

Conclusion

Because the Three Affiliated Tribes' current gaming compact does not allow gaming on Lake Sakakawea, it could occur only with a compact amendment. In negotiating an

amendment, however, the Governor is prohibited by state law from negotiating one that would allow off-reservation gaming.

This restriction implicates the Tribe's request to expand its gaming operations to Lake Sakakawea because it appears that the 1949 Taking Act may have diminished the Fort Berthold Indian Reservation. In particular, the Act may have removed the Taken Area – essentially what is today Lake Sakakawea – from reservation status. A definitive answer to this issue, however, must await a court ruling.

Sincerely,

Wayne Stenehjem
Attorney General

cmc

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March 21, 2005

MEMORANDUM

To: Jennifer Fyten
Cc: Steve Kelly

From: Dean Suagee

Subject: Review of proposed Water Quality Standards for the Fort Berthold Reservation

This responds to your request that I review the proposed water quality standards for the Three Affiliated Tribes, Fort Berthold Reservation (herein "Draft WQS"). I have reviewed the document you sent to me under cover letter dated March 7, 2005; the document is not dated.

This memorandum presents discusses some of the legal issues relating to the adoption of water quality standards for the Fort Berthold Reservation and offers my initial observations on the Draft WQS, with an emphasis on legal rather than technical issues.

In writing this memorandum, I reviewed a number of documents generated by EPA, including a table prepared by EPA's Office of Science and Technology, captioned "Indian Tribal Approvals for the Water Quality Standards Program" (Jan. 4, 2005) (herein "EPA TAS for WQS Table") (copy enclosed). I noticed that the EPA TAS for WQS Table lists the Three Affiliated Tribes as having submitted an application for TAS for the WQS program on December 30, 1996. This table indicates that approval by EPA is "pending action by the Tribe." We need to know what EPA has asked the Tribe to do. Assuming that EPA has conveyed its concerns to the Tribe in writing, we need to review the relevant documents. In light of the fact that I have not reviewed any such relevant correspondence between the Tribe and EPA, my comments later in this memorandum on the Draft WQS must be understood as preliminary.

BACKGROUND ON WATER QUALITY STANDARDS AND THE CLEAN WATER ACT

The Clean Water Act (herein "CWA"; also known as the Federal Water Pollution Control Act (FWPCA)) is a complex statute that authorizes a number of regulatory programs. 33 U.S.C. §§1251 – 1387. Water Quality Standards (WQS) play a basic role in several of the regulatory programs created under the CWA, including the permit program for "point" sources of pollution, authorized by CWA section 402, commonly referred to as the National Pollutant Discharge Elimination System or NPDES permit program. In 1972, when Congress overhauled the FWPCA and turned it into a regulatory statute, the main emphasis was controlling pollution into surface waters from various kinds of pipes and other conveyances, so-called "point" sources. Under EPA's regulations, a NPDES permit cannot be issued if it would result in a violation of the WQS for the body of surface waters where the discharge would occur. 40 C.F.R. §122.4(d).

Like several of the major regulatory statutes administered by EPA, the CWA is federalist in its approach, in that it creates a partnership between EPA and the states: some roles are performed

by EPA but can be taken over by states; some roles are performed in the first instance by states and cannot be performed by EPA unless it determines that a state is not performing the role, or unless it determines that a state program does not comply with the requirements of federal law. In 1987, the CWA was amended, including section 518, 33 U.S.C. §1377, which authorizes EPA to treat tribes like states for a range of purposes. The statute uses the term "treatment as a state" and this is often referred to as "TAS."

In the CWA, the role of adopting WQS is assigned to the states. EPA does not promulgate WQS unless a state does not, or unless a state fails to ratchet up its WQS to meet newly established requirements of federal law. (For the most part, this occurs in the context of new requirements relating to toxic pollutants.) There are no generally applicable minimum federal WQS. As defined in EPA regulations, water quality standards (WQS) are:

> "Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act." 40 C.F.R. §§130.2, 131.3(i).

The two key components of WQS, as set out in the definition, are "designated uses" and "water quality criteria." "Designated uses" are "those uses specified in water quality standards for each water body or segment whether or not they are being attained." §131.3(f). "Criteria" are "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use." §131.3(b).

In other words, the designated use is a policy judgment of what kinds of uses a water body or segment should support, and criteria are the techniques used to ascertain whether the water in a particular water body or segment actually supports its designated use(s). Criteria can be either "numeric" or "narrative." Numeric criteria, such as concentrations or levels of a particular kind of pollutant, are easier to measure and thus to enforce. Narrative criteria are kind of a fall-back way of stating a condition that is either desired or prohibited. In the last decade or so, EPA has encouraged states, and tribes treated like states, to consider using a third kind of criteria: biological criteria, in which one or more indicator species of aquatic life is used to measure the health of an aquatic biological community.

States are charged under CWA section 303, 33 U.S.C. §1313, with responsibility for setting WQS, and tribes have the option of seeking treatment like states and adopting WQS. EPA's role is providing technical guidance and reviewing state and tribal standards. EPA's guidance document, the Water Quality Standards Handbook (second edition, 1994) is available on an EPA website: www.epa.gov/waterscience/standards/handbook. If a state or tribe uses the methodology set out in this guidance document, EPA will approve the standards; if a different methodology is used, it must be scientifically defensible. When state or tribal WQS are approved by EPA they become "part of the federal law of water pollution control." *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992).

States are required by the statute, and EPA regulations, to hold at least one public hearing before adopting WQS, and to review their WQS at least once every three years, including a public

hearing. 40 C.F.R. §131.20(b) and 40 C.F.R. part 25 (EPA's public participation regulation). Tribes that set WQS are also subject to this requirement. States were originally required to adopt standards no later than three years after the 1972 version of the CWA was enacted. There is no similar deadline for tribes that seek to become treated like states for the WQS program.

In addition to the standard setting role performed by states in adopting WQS, EPA also plays key roles in determining the terms and conditions of NPDES permits issued pursuant to CWA section 402. The NPDES permit program is a program administered by EPA; while it can be delegated to states (and has been to more than two-thirds of the states), it is carried out pursuant to EPA regulations. 40 C.F.R. parts 122, 123, 124, 125. NPDES permits must include "effluent limitations" to ensure compliance with state WQS and to ensure compliance with other requirements established by EPA under the act, including technology-based performance standards for certain categories of industrial point sources, toxic pollutants, and pretreatment of certain kinds of sources that discharge into publicly owned waste water treatment works. 33 U.S.C. §1316, 1317. Effluent limitations and WQS can be thought of as a kind of two-pronged approach to establishing limits for point sources. In general, the NPDES permit program is supposed to work like this: if a point source is subject to one or more of the nationally applicable standards established by EPA, then effluent limitations based on such standard(s) are included in the permit; if compliance with an applicable effluent limitation would nevertheless result in a violation of an applicable WQS, then terms and conditions must be added to the permit to ensure compliance with the WQS; and, if there is no applicable effluent limitation, then compliance with the applicable WQS is the basic requirement for the permit.

This approach allows states to ratchet up the requirements if they determine that effluent limitations imposed by EPA under its authority are not sufficient to protect the quality of their surface waters. In addition, for the kinds of standards that EPA has adopted (industrial point sources, toxic pollutants, and pretreatment), a state may adopt standards that are more stringent. 33 U.S.C. §1320. Tribes may also adopt WQS that include more stringent provisions than required by federal law. *Albuquerque v. Browner*, 97 F.3d 415 (9th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

This federalist approach is reinforced by CWA section 401, which provides an opportunity for the state with jurisdiction over the water body where a point source will discharge to "certify" compliance with its WQS. 33 U.S.C. §1341; 40 C.F.R. part 121. If the state determines that the discharge would violate its WQS, the permit cannot be issued. This requirement applies to NPDES permits issued by EPA and to other permits and licenses issued by any federal agency that authorize the discharge of a pollutant into surface waters, such as a permit issued by the Army Corps of Engineers under section 404 of the CWA or a license issued by the Federal Energy Regulatory Commission to operate a hydroelectric power plant. Downstream states and tribes treated like states have a right to participate in the NPDES permit process to insist that their standards not be violated by an upstream permit, but only the state with jurisdiction over the receiving waters has the power to veto a permit. EPA can block a permit if it determines that a downstream state's or tribe's WQS would be violated, but the factual determination of whether such a violation would occur is up to EPA. That was one of the holdings in *Arkansas v. Oklahoma, supra.*

This discussion of the CWA is has not touched on many aspects of the statute. I hope it is enough for present purposes.

THE CWA IN INDIAN COUNTRY

EPA has issued a number of rule-making documents to implement TAS under CWA section 518 for various CWA programs. The final rule on TAS for the WQS program was issued in 1991. 56 Fed. Reg. 64876 (Dec. 12, 1991). EPA made some key policy decisions in this and other rule-making documents on TAS, based on its interpretation of the statute. I have recapped that in a recent short article captioned "Indian tribes and the Clean Water Act" in Trends, a publication of the American Bar Association Section on Environment, Energy and Resources (copy enclosed), and in much more detail in my chapter "Indian Country Environmental Law," Chapter 15A in Environmental Law Practice Guide: State and Federal Law (Matthew Bender) (a copy of which you already have).

Briefly, EPA has interpreted CWA section 518 as requiring each tribe seeking TAS to show that it has sufficient inherent sovereignty to carry out the WQS program (or any other CWA regulatory program for which it seeks TAS). This interpretation is based, in part, on the federalist approach of the CWA, in which states perform some roles based on their own sovereignty, including adoption of WQS. EPA considered the question of whether Congress had intended to delegate federal authority to tribes, and determined that the intent of Congress on this point was not clear. EPA said that this issue is not resolved. 56 Fed. Reg. at 64881.

What this means, as explained by EPA in the preamble to its final rule, is that when a tribe seeks to exercise authority over non-trust lands within a reservation, the tribe must show that it has sovereignty under the second exception to the general proposition of *Montana v. United States*. As of 1987, when CWA section 518 was enacted, there were no Supreme Court decisions applying the *Montana* general proposition and its exceptions. By the time EPA issued its final rule in 1991, one such case had been decided, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*. In its final rule, EPA expressed the view that tribes would generally be able to show that they have jurisdiction over non-trust land, based in part on one of the basic purposes of the CWA, which is to protect the public health and welfare – regulating the quality of surface waters protects public health and welfare. EPA reasoned that if a tribe can show that the discharge of pollutants into reservation surface waters would threaten the health and welfare of tribal members, that would be sufficient to establish inherent tribal sovereignty under *Montana*'s second exception.

EPA's interpretation has been upheld in court. *Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998). EPA has continued to approve tribes for TAS for setting WQS, with thirty tribes having been approved as of January 4, 2005. EPA TAS for WQS Table, *supra*. Most recently, EPA approved the Pawnee Nation in Oklahoma on November 4, 2004. There is a widely held perception, however, that EPA is processing such applications slowly, especially those for reservations that include substantial areas of non-trust land. (As noted earlier, the EPA TAS for WQS Table lists the Three Affiliated Tribes as having submitted an application for TAS for the WQS program on December 30, 1996, and indicates that approval by EPA is "pending action by the Tribe.")

The lack of approved tribal WQS in much of Indian country (about 300 reservations with no approved standards) creates a gap in the regulatory framework established by the CWA. As interpreted by EPA, the CWA does not give states authority to adopt WQS that apply within Indian country, and unless states convince EPA that they have such a grant of authority from Congress, EPA assumes that they do not have authority. Since there are no generally applicable federal WQS, this means that until a tribe gets approved and sets WQS, or until EPA goes through the process of promulgating federal WQS for a reservation, as a matter of law, there are no applicable WQS for reservation surface waters. North Dakota's WQS do not mention the existence of Indian reservations within the state and purport to establish standards for some water bodies that are within reservations, including Lake Sakakawea and the Little Missouri River. N.D. Administrative Code, Chapter 33-16-02.1.

In its final rule for TAS for the WQS program, EPA did say that, until tribal or federal WQS are in place for a reservation, it would assume that NPDES permits that include limitations based on state WQS are enforceable, as a matter of policy rather than as a matter of law. 56 *Fed. Reg.* at 64891. EPA has also taken the position that where states have taken over the NPDES permit program, they generally do not have authority to issue permits within reservations, unless EPA has expressly determined that they do have such authority. EPA action to block a proposed state-issued permit for a source within a reservation has been upheld in court. *Michigan Dept. of Environmental Quality v. EPA*, 318 F.3d 705 (6th Cir. 2003).

As discussed in my short *Trends* article, during the last few years of the Clinton Administration, EPA consulted with tribes on a proposal to establish a basic set of federal WQS for all of Indian country for which tribal WQS have not yet been adopted. While that proposal was signed by EPA during the last days of the Clinton Administration, it was never published in the *Federal Register*, and there is no indication that EPA intends to move forward with it any time soon.

So, the bottom line remains – there is a regulatory gap in the implementation of the CWA. There are no legally applicable WQS for surface waters within the Fort Berthold Reservation. There will not be any applicable WQS until either the MHA Nation is approved for TAS by EPA and has its WQS approved by EPA, or until EPA promulgates federal standards.

THE OPTION OF A DIRECT IMPLEMENTATION TRIBAL COOPERATIVE AGREEMENT (DITCA).

The option of having EPA promulgate federal WQS is worth exploring. Much of the work in doing this could be accomplished through an agreement between the Tribe and EPA, a "Direct Implementation Tribal Cooperative Agreement" or "DITCA." DITCAs have been authorized in annual appropriations acts every year since 2001. On November 24, 2004, EPA issued a guidance document on DITCAs (copy attached). (This document is available on the web site of EPA's American Indian Environmental Office: www.epa.gov/indian. This guidance document cites FY 2004 appropriations act language stating that a DITCA can be used to assist EPA "in carrying out the Agency's function to implement directly Federal environmental programs required or authorized by law in the absence of an acceptable tribal program." The guidance documents interprets this as authorizing DITCAs to "fund activities for environmental programs that meet either one of the following criteria":

"1) federal programs under environmental laws that EPA is clearly required to directly implement in the tribal context; or
"2) federal programs under environmental laws in the state context that EPA is required to directly implement in the absence of an acceptable state program."

The guidance document expressly includes the WQS program (promulgation and review) as an example of a program that is eligible for DITCA funding.

Accordingly, if the real reason that EPA has not approved the MHA Nation for TAS for setting WQS is that EPA is not convinced that the Nation has adequately demonstrated inherent sovereignty over some portions of the Reservation where most of the land is not held in Indian trust status, the Nation could enter into a DITCA with EPA through which the Nation would work toward the promulgation of federal WQS by EPA.

PRELIMINARY OBSERVATIONS ON THE MHA NATION'S DRAFT WQS.

From my review of the Draft WQS, I have three "big picture" concerns and also noticed a few more technical issues. This memo discusses the big picture concerns first.

Land ownership and inherent tribal sovereignty. The map of "land status" shows that moist of the land in the northeast and northern segments of the Reservation are held in fee status (generally the area opened to non-Indian settlement in 1910). The map of "lakes, streams, and watersheds" did not reproduce very well, but it appears that much of the fee land is in an area characterized by prairie potholes rather than streams. In northeastern part of this area, what streams there are appear to drain to the northeast, away from the Missouri River. The topography of this area may make it difficult to show, under EPA's interpretation of the CWA, that the MHA Nation has sufficient inherent sovereignty to set WQS for the surface waters in this area, since the key factor is whether the discharge of pollutants into these waters would threaten the health and welfare of tribal members. If this is indeed the reason that EPA has been reluctant to approve the MHA Nation for TAS for the WQS program, we may want to consider the option of entering into a DITCA to develop federal WQS for this area, or perhaps for the entire Reservation. (I am not aware of EPA having ever entered into a DITCA with a tribe to develop WQS for part of a reservation rather than for an entire reservation. Given the fact that it was only in November 2004 that EPA expressly said that a DITCA can be used to develop WQS, it may be that this issue has simply not yet come to the attention of EPA.)

Designated uses. EPA's regulations for WQS, 40 C.F.R. §131.10(a), suggest that that there are six basic kinds of designated uses:

Public water supplies;
Protection and propagation of fish, shellfish and wildlife;
Recreation in and on the water;
Agricultural;
Industrial; and
Other, including navigation.

State WQS generally adopt some variation on this list. The MHA Nation Draft WQS use this list, with two categories being subdivided: recreation is divided into primary contact and secondary contact; and the aquatic life category is divided into warm water and cold water. This is fairly typical, although some states do use more elaborate classification systems.

This system allows states to establish a hierarchy in their water quality criteria: as a general rule, criteria for water that will be delivered to people for drinking needs more stringent criteria than water that people will swim, which in turn needs more stringent criteria than water that people ride over in boats or use for industrial processes.

What is unusual about the MHA Nation Draft WQS is that all surface waters are designated for all uses categories, with the exception that no water bodies are designated for warm water aquatic life. See pages 6-7. It's a bit of an oversimplification, but in general this means that to comply with the draft WQS, all surface water bodies would have to be clean enough to use for drinking water.

In contrast, the North Dakota WQS employ a more conventional approach, with five classes for streams and five different classes for lakes. ND Administrative Code, §33-16-02.1-09. In the ND WQS, the classification system is a kind of hierarchy, with class I streams capable of supporting most uses (but requiring some treatment to be suitable for public water supplies), class II streams requiring additional treatment for drinking water, and class III generally suitable for agricultural and industrial uses but of limited value for recreation or aquatic life. In the ND WQS, for example, the Missouri River, including Lake Sakakawea, is designated class I, the Little Missouri River is designated class II, and all tributaries not specifically mentioned are class III.

The major policy issue this: does the MHA Nation really want to designate all its surface waters as suitable for drinking water? While it is admirable to set high standards for water quality, doing so will have implications for the kinds of industrial activities that take place on the Reservation for which NPDES permits are required, and may also have some implications for agricultural activities. If the surface waters do not meet those standards, the Nation might have to treat such water bodies as "impaired," which would require the development of total maximum daily loads (TMDLs). My guess (and this is just a guess) is that the tribal officials may not have worked through the implications of the basic policy decisions that go into designating uses for surface waters.

Relationship of the WQS to other tribal environmental law. From my reading of the Draft WQS, they appear to occur in a vacuum, without any supporting tribal environmental law. It may be that I just have not been provided with all of the relevant documents, but the Draft WQS document does not reference any other law-making documents.

In the non-Indian context, i.e., when states adopt WQS, they usually do it through rule-making. For example, in North Dakota, Century Code title 61 chapter 28 authorizes the Department of Health to adopt WQS through rule-making. That state statutory chapter also creates an advisory board, the state water pollution control board, to assist the Department of Health in adopting and reviewing WQS. In addition to WQS, the state statute charges the Department of Health with a range of other responsibilities relating to water quality. In carrying out this mission, the

Department of Health is subject to the state's Administrative Agencies Practice Act, ND Century Code title 28 chapter 32.

It is my understanding that for some tribes that have adopted WQS approved by EPA, the WQS are set forth in a document that the tribal governing body has endorsed through a resolution. In my view, it is preferable to enact tribal statutory law delegating authority to a tribal government agency to develop the WQS and to perform other duties in carrying out a water quality program, including certification under CWA section 401. I also like the idea of a tribal agency developing WQS through rule-making, like state agencies do, possibly with the assistance of an advisory board, which could include people who are not tribal members.

My point is that WQS, while of fundamental importance, are only part of the picture. There also needs to be a framework created through tribal law that so that there are tribal government institutions with authority to implement programs, and carry out processes, to protect and enhance water quality.

Some rather technical points regarding the Draft WQS. The points in this section are only preliminary observations. I may want to revise or add to these observations after reviewing whatever correspondence there is between EPA and the MHA Nation that sheds light on why EPA lists the MHA Nation's application for TAS as "pending action by the Tribe."

Narrative biological criterion. I am curious about why this provision, on page 4, says that regulatory or enforcement action based solely on this criterion is not authorized at this time. I note that the ND WQS includes very similar language.

Water quality criteria for various uses. I noticed that the numeric criteria for almost all pollution parameters are more stringent for "public water supply use" than for any other use. See pages 8-12. If indeed as noted above all surface waters are going to be designated for use as public water supplies, there is no need to set out less stringent criteria for other designated uses (except for those parameters for which there is no criterion for drinking water). I am not really suggesting that there is no need for such less stringent criteria, but rather am pointing out one of the implications of designating all surface was as suitable for public water supplies.

Fish consumption. I note that in the explanatory notes on page 13, one of the notes references EPA's human health criteria recommendation "based on fish consumption assuming 6.5 grams of fish consumed per day over a 70-year lifetime." This amount, 6.5 grams per day, can be converted to 45.5 grams per week, which is less than 2 ounces per week. If tribal members and other persons living on the Fort Berthold Reservation consume more fish than this amount, the relevant criteria should be adjusted accordingly. The EPA's National Environmental Justice Advisory Council (NEJAC) has issued a report on fish consumption, and one of the issues addressed in that report is the practice among many Indian tribes and minority populations of eating substantially more fish than the assumptions built into EPA's recommendations.

I hope you find this memorandum useful. I would be happy to discuss it with you at your convenience. As we discussed on the phone today, it may be useful to discuss this matter duing my visit to New Town on April 4 and 5.